IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

CREST SPECIALTY (NOT INC.),

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In the

United States Court of Appeals

For the Seventh Circuit

No. 10118

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN,

Plaintiffs-Appellees,

vs.

CREST SPECIALTY (NOT INC.),

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 2nd day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Thursday, January 26, 1950.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an Individual, *Plaintiffs,* *vs.* Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, *Defendants.*	No. 49-C-8.

Be It Remembered, that, on to-wit: the 4th day of January, 1949, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—49-C-8) * *

COMPLAINT.

Plaintiffs, David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an individual, for their complaint against the Defendants allege:

1. This is a civil action for infringement of United States Letters Patent and is based on the Patent Laws of the United States, and is also an action for unfair competition arising out of the said infringement.

2. Plaintiff David C. Trager is an individual, a citizen of the United States of America, and a resident of the State of Illinois and the City of Chicago, and is doing business as Topic Toys, with a principal place of business

located at 174 West Jackson Boulevard, Chicago, in the County of Cook and State of Illinois.

3. Plaintiff Eoina Nudelman is an individual, a citizen of the Republic of France, residing in the United States of America, and a resident of the City of Chicago and State of Illinois, residing at 4 East Ohio Street, Chicago, Illinois.

4 4. The Defendants, Crest Specialty (not Inc.) is a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, with their principal place of business located at 663 West Washington Boulevard, Chicago, in the County of Cook and State of Illinois, at which place of business, as well as elsewhere in the United States, acts of infringement and acts of unfair competition herein complained of were committed.

5. On November 30, 1948, United States Letters Patent No. 2,455,266 were duly and legally issued to Plaintiff Eoina Nudelman for an invention in a Children's Amusement Device; and since that date Plaintiff Eoina Nudelman has been and still is the owner of said Letters Patent.

6. Plaintiff David C. Trager, doing business as Topic Toys has the sole and exclusive license to make, use and sell throughout the United States of America, the improvements set forth in said Letters Patent No. 2,455,266.

7. Plaintiff David C. Trager, doing business as Topic Toys has pursuant to said exclusive license and for some time past manufactured and sold the invention embodied in said Letters Patent and has made same available to the public.

8. Plaintiff David C. Trager, doing business as Topic Toys has placed the required statutory notice on all Children's Amusement Devices manufactured and sold by him under said Letters Patent since the issuance of said patent.

9. The Defendants, Crest Specialty, a limited partnership composed of the individuals identified in paragraph 4 hereof, have and still are infringing said Letters Patent by making, selling and using Children's Amusement Devices embodying the patented invention as claimed in

5 Claims 2 and 3 of said patent, and will continue to do so unless enjoined by this Court.

10. In addition to the acts of infringement hereinabove complained of, the Defendants have engaged in unfair competition with Plaintiffs, as hereinafter set forth.

(a) The Plaintiff David C. Trager, doing business as

Topic Toys, and pursuant to said license from the patentee Eoina Nudelman was the first to manufacture and sell a Children's Amusement Device consisting of an animal character, with the body of the animal character positioned adjacent the exterior of a feeding bowl, with the forelegs of the animal character extending forwardly and overlying a portion of the bowl, with the said animal character having a simulated mouth and a passage which extends downwardly from the mouth, whereby the contents of a spoon may be poured into said simulated mouth and fall by gravity into the feeding bowl.

(b) The said Plaintiff has extensively advertised said Children's Amusement Device throughout the trade, and has sold a large number of said Children's Amusement Devices throughout the United States.

(c) The said Plaintiff in packaging said Children's Amusement Device has packaged it with a feeding bowl and a spoon and fork of children's size made of plastic with the handles thereof formed to simulate in relief the head of an animal character, and the said Plaintiff has sold said component parts all in one box and package, and the said Plaintiff has illustrated and depicted on the box cover the said Children's Amusement Device positioned against a feeding bowl and illustrating the manner whereby the food in a feeding spoon is poured into said Children's Amusement Device and empties back into said bowl, and the said Plaintiff has so packaged and sold its said product throughout the trade and has built up a
6 valuable good will and a large and substantial business in connection therewith, and Plaintiff further alleges that since Defendants' infringement and unfair competition said Plaintiffs have sustained and are now sustaining a large and substantial loss of sales and business in said Amusement Devices, and have sustained and are now sustaining large and substantial damages.

(d) That due to the unique character, characteristics and appearance of said Children's Amusement Device, as being the first of its kind ever manufactured and produced anywhere, the said Children's Amusement Device has become so associated with the said Plaintiff in the minds of the buyers and the public as to have acquired significance or secondary meaning to cause any Children's Amusement Device of substantially the same unique character, characteristics and appearance to be ascribed to the Plaintiff as the source of production, and the Defendants have ex-

tensively advertised, offered for sale, and have made and sold infringing Children's Amusement Devices having said unique character, characteristics and substantially the same appearance as that of Plaintiff's, with the intent and result of profiting in the inevitable confusion created by Defendants' infringing devices.

(e) The Defendants have imitated and copied the Plaintiffs' Children's Amusement Device by making an animal character of the same material, with the body of the animal character positioned adjacent the exterior of a feeding bowl, with the forelegs of the animal character extending forwardly and overlying a portion of the bowl, with the said animal character having a simulated mouth and a passage which extends downwardly from the mouth whereby the contents of a spoon may be poured into the simulated mouth and fall by gravity into the feeding bowl.

7 (f) The Defendants in packaging said device have packaged same in association with a feeding bowl and in said package have included a Children's size plastic feeding spoon and fork, the handle portions of which have formed in relief the head of an animal character, and the Defendants have illustrated and depicted on the box cover a Children's Amusement Device positioned against a feeding bowl and illustrating the manner whereby the food in a feeding spoon is poured into the Children's Amusement Device and empties back into the feeding bowl.

(g) The Defendants have unfairly copied the distinctive features of Plaintiffs Children's Amusement Device, have unfairly associated it with other parts, and have unfairly packaged same in a container, all closely resembling and similar to the said Plaintiff, and that as a result thereof the Defendants have been and still are engaged in unfair competition with Plaintiffs, all to the injury of Plaintiffs.

Wherefore, Plaintiffs demand a preliminary and final injunction against further infringement of Claims 2 and 3 of Patent No. 2,455,266 by the Defendants and all of them; a preliminary and final injunction against the unfair competition by Defendants and those controlled by Defendants; and an accounting for damages and reasonable royalty as a result of said patent infringement, together with an accounting for profits and damages as a result of the unfair competition; together with the costs of the suit

and interest, and that Plaintiffs be awarded a reasonable attorney's fee, and pray for such other and further relief as to the Court may seem just.

David C. Trager,
Eoina Nudelman.

Max R. Kraus,
Attorney for Plaintiffs,
33 North LaSalle Street,
Chicago, Illinois.

8 State of Illinois, } ss.
County of Cook. }

David C. Trager, being duly sworn, deposes and says that he is one of the Plaintiffs in the foregoing Bill of Complaint; that he has read said Bill of Complaint, and that the facts therein stated are true, except as to such facts as may be stated on information and belief, and as to such facts he believes them to be true.

David C. Trager.

Subscribed and sworn to before me this 4th day of January, 1949.

Mildred L. Guttman,
Notary Public.

(Seal)

State of Illinois, } ss.
County of Cook. }

Eoina Nudelman, being duly sworn, deposes and says that he is one of the Plaintiffs in the foregoing Bill of Complaint; that he has read said Bill of Complaint, and that the facts therein stated are true, except as to such facts as may be stated on information and belief, and as to such facts he believes them to be true.

Eoina Nudelman.

Subscribed and sworn to before me this 4th day of January, 1949.

Mildred L. Guttman,
Notary Public.

(Seal)

(Letters Patent Attached But Not Copied.)

9 And afterwards on, to wit, the 4th day of February, 1949 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Answer in words and figures following, to wit:

10 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—49-C-8) * *

DEFENDANT'S ANSWER.

Now come the defendants named in the above entitled complaint, by their attorney, Clarence E. Threedy, and make answer to the complaint as follows:

1.

Defendants deny that the alleged charge of unfair competition is an action arising out of an alleged charge of infringement based on the Patent Laws of the United States and deny that this Court has jurisdiction in respect to said alleged charge of unfair competition and, therefore, by reason thereof, move that the complaint be dismissed insofar as it is bottomed upon an alleged charge of unfair competition.

2.

Defendants admit the allegations contained in Paragraphs 2 and 3 of the complaint herein.

3.

Defendants admit that it is a limited partnership as alleged in paragraph 4 of the complaint herein but deny that they have committed the acts of infringement or unfair competition as charged in the complaint and that this
11 Court has jurisdiction with respect to the alleged charge of unfair competition.

4.

Defendants admit that a document purporting to be Letters Patent No. 2,455,266 were issued on November 30, 1948, as alleged in paragraph 5 of the complaint herein, but, upon information and belief, deny that said Letters Patent No. 2,455,266 were duly, legally or validly issued.

5.

Defendants are not informed, save by the complaint herein, as to the allegations set forth in paragraph 6 of such complaint and, therefore, deny the same.

6.

Defendants are not informed, save by the complaint herein, as to whether Eoina Nudelman is the owner of Letters Patent No. 2,455,266, and, therefore, leave plaintiffs to strict proof thereof.

7.

Defendants have no knowledge of the allegations contained in paragraphs 7 and 8 of the complaint herein and, therefore, call upon plaintiffs for strict proof thereof.

8.

Defendants deny each and every allegation contained in paragraphs 9 and 10 and sub-paragraphs a to g inclusive of the complaint herein and call upon plaintiffs for strict proof thereof.

9.

Defendants deny that plaintiffs are entitled to any injunction, accounting, assessment, relief or aid of any nature whatsoever as prayed for in the complaint herein.

First Defense.

Defendants deny that they have or are now infringing said Letters Patent No. 2,455,266, particularly claims
12 2 and 3 thereof, or that they have committed the acts of unfair competition as charged in the complaint herein or are in any way engaged in unfair competition with plaintiffs.

Second Defense.

Defendants aver and believe the fact to be that Letters Patent No. 2,455,266, and particularly claims 2 and 3 thereof, are invalid, void and of no effect because the alleged invention, improvement and discovery thereof has been known, used, described and published before the patentee's

purported invention thereof and more than one year prior to his application for said patent, and all of the material and substantial parts of said alleged invention and improvement thereof are disclosed and taught in certain publications including the following U. S. Patents and publications:

Patent No.	Patentee	Date	Title
226,831	J. H. Bowen	April 27, 1880	Toy Money Box
516,354	R. MacMorris	Mar. 13. 1894	Detachable Mustache Shield or Guard for Cups
1,751,773	B. Trosper	Mar. 25, 1930	Toy Figure
2,170,311	E. P. Smith	Aug. 22, 1939	Bowl
2,207,417	I. A. Smith	July 9, 1940	Cereal Bowl

Third Defense.

Defendants aver further that said Letters Patent No. 2,455,266, and particularly claims 2 and 3 thereof, are invalid and void because the alleged invention purported to be disclosed and described thereby is devoid of any patentable novelty in view of prior knowledge and the well-known state of the art, and does not constitute patentable subject matter within the meaning of the U. S. Patent Statutes, but, on the contrary, represents a mere aggregation of old and well-known parts and expediencies in common use long prior to any alleged invention by the patentee
13 and within the reach and skill of any mechanic or artisan working in the art to which said alleged invention appertains and in analogous arts.

Fourth Defense.

Defendants aver that each and every claim of the patent in suit, and especially claims 2 and 3 thereof, were so limited and restricted by proceedings had and of record in the U. S. Patent Office in connection with the application for said patent, that said claims cannot now be construed and enlarged to such breadth and scope as to cover any device made, used, or sold by these defendants or any party in privity with them.

Prayer.

Wherefore, defendants pray that the complaint herein be dismissed for want of equity and that said Letters Patent No. 2,455,266, and particularly claims 2 and 3 thereof, be declared invalid and not infringed and that plaintiffs be required to pay the full cost of this suit and that defendants have such other aid and relief in the premises as shall be deemed just and equitable.

Crest Specialty (Not Inc.),
By Clarence E. Threedy,
Its Attorney.

February 4, 1949,
Chicago, Illinois.

Receipt of a copy of the foregoing Answer is hereby acknowledged this 4th day of February, 1949.

Max Richard Kraus,
By Genevieve Grendal,
Attorney for Plaintiffs.

14 And afterwards on, to wit, the 21st day of October, 1949 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

15 In the District Court of the United States.
* * (Caption—49-C-8) * *

STIPULATION.

It Is Hereby Stipulated And Agreed, by and between counsel for the parties to the above-entitled cause, for the purposes of this case only, as follows:

1. That the ownership of the title to the patent in suit is in plaintiff Eoina Nudelman as alleged in the Complaint.

2. That plaintiff David C. Trager, doing business as Topic Toys, has by virtue of a license agreement entered into between plaintiff Eoina Nudelman and said David C. Trager, the sole and exclusive license to make, use, and sell throughout the United States of America the improvement set forth in letters patent No. 2,455,266 in suit.

3. That the contents of the carton entitled "Puppy Tu Eats with You", consisting of a bowl, tumbler, spoon and fork, and dog figure, which are marked collectively as Plaintiffs' Exhibit 2, have been manufactured and sold
16 by the defendants within the Northern District of Illinois and elsewhere since November 30, 1948, and were being manufactured and sold at the time of the filing of the Complaint herein.

4. That either party may offer and use in evidence ordinary uncertified printed copies of United States letters patent or photostatic copies thereof; that in the case of other printed publications, reprints or phostatic copies of one or more pages thereof may be offered and used in evidence by either party; that said copies of patents and printed publications or photostatic reproductions thereof may be used with the same force and effect as the originals or duly certified copies thereof, subject to correction if error be made to appear, and subject to the same objections as the originals; and provided further, that in the case of the use of less than an entire publication, the opposing party shall have the right to offer in evidence reprints or photostatic copies of such other parts or of the whole of such publication or publications as it may choose.

5. That on said copies of said patents offered and received in evidence, the application filing dates printed upon the United States patents shall be accepted as the correct dates upon which the original applications for the respective patents were filed; the patent dates appearing on said United States patents shall be accepted as the correct dates of patenting and publication thereof; the dates and other facts of publication appearing on the title page or other part of printed publications shall be accepted as prima facie proof of such dates and facts of publication; that the dates shown by the library stamp of the United States Patent Office appearing on any printed publication shall be accepted as prima facie proof that a copy of
17 said publication was in the United States Patent Office as early as said date—all of the foregoing being subject to correction if error be made to appear therein.

Sidney Neuman,
Attorney for Plaintiffs,
Clarence E. Threedy,
Attorney for Defendants.

Chicago, Illinois,
October 11, 1949.

18 And afterwards on, to wit, the 26th day of January, 1950 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had Before Honorable Michael L. Igoe, Judge, Portions Of Which, are in words and figures following, to wit:

20 Mr. Neuman: If your Honor please, we have entered into a stipulation which covers various formal matters and which also covers our agreements as to the use of printed copies of the patents, photostats and publications and things of that sort.

The Court: You want this filed, I take it?

Mr. Neuman: I wish to file that, yes.

The Court: No objection to that?

Mr. Neuman: It is the stipulation.

Mr. Threedy: No, no objection to that.

Mr. Neuman: I wish to have marked as Plaintiff's Exhibit No. 1 a copy of the Nudelman patent.

Mr. Threedy: If your Honor please, it has just been called to my attention that I stated the Smith patent was issued in 1949. That is in error.

The Court: When was it issued?

Mr. Threedy: 1940.

Mr. Neuman: Plaintiffs' Exhibit No. 1.

(Which said document was so marked PLAINTIFFS' EXHIBIT No. 1 for identification and was thereupon received in evidence.)

Mr. Neuman: I wish to make an offer in evidence of Plaintiffs' Exhibit No. 2, the defendants' device. In
21 that stipulation which I handed to your Honor we have provided that this box and its contents, the contents consisting of a puppy and the bowl, a spoon and a fork and a cup, was manufactured and sold by the defendants, subsequent to the issuance of our patent and before the filing of this law suit, I would like to make an offer—

The Court: That is stipulated, is it?

Mr. Threedy: That is correct, yes.

Mr. Neuman: I would like to mark the box and contents as collective exhibit, Plaintiffs' Exhibit No. 2.

(Which said articles were so marked as PLAINTIFFS' EXHIBIT No. 2 for identification and were thereupon received in evidence.)

The Court: In the figure of the puppy, does the food go into the bowl, too?

Mr. Threedy: That is correct, yes.

22 DAVID C. TRAGER, one of the Plaintiffs herein, called on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Neuman.

Q. Will you please state your name and residence?
A. David C. Trager, 6200 North Kenmore.
Q. You are one of the plaintiffs in this suit?
A. I am.
Q. And what is the name under which you are doing business, please, Mr. Trager?
A. Topic Toys.
Q. I show you two cartons, each being entitled "Hungry Piggy" and ask you whether or not you are the manufacturer and seller of the "Hungry Piggy" feeding set?
(Articles shown to the witness.)
A. I am.
Q. Are these the cartons in which your merchandise is sold?
A. They are the boxes, yes.
Q. All right, what is the difference between the two boxes?

23 A. Well, in the smaller box we have the "Hungry Piggy," and bowl alone, and in the larger box, we term it a five-piece unit which includes a fork, a spoon, and a stand for the fork and spoon as well as the bowl and the "Piggy."

Mr. Neuman: I would like to mark these as Plaintiffs' Exhibits 3 and 4 as being the form in which the patented device has been sold.

Let us mark the large box and its contents as Plaintiffs' Exhibit 3 and the small box and its contents as Plaintiffs' Exhibit 4.

(Which said articles were marked PLAINTIFFS' EXHIBITS 3 and 4, respectively, for identification and were thereupon received in evidence.)

By Mr. Neuman:

Q. I show you a printed item which was in one of these boxes, will you please tell us what that is?
(Document shown to the witness.)
A. This is literature describing the contents of the box and its use, how the mother should use the item.

Q. Is that placed in both the large and the small boxes?

A. Yes, it is, yes, sir.

Mr. Neuman: May I mark that as an additional exhibit, Plaintiffs' Exhibit No. 5?

(Which said document was so marked PLAINTIFFS' EXHIBIT No. 5 for identification and was thereupon received in evidence.)

By Mr. Neuman:

Q. When did you first become acquainted with this "Hungry Piggy" device?

A. March of 1948.

Q. And who showed it to you, Mr. Trager?

A. Mr. Nudelman.

Q. And what was the purpose of his showing this to you?

A. He wanted someone to finance it and put it out for sale and he thought I might be interested in the item and he would work on a royalty basis.

Q. Had you been in such a business prior to that time?

A. No, I had not, the only thought is he came to me with some mutual friends and they thought that I could organize a sales organization to promote an item of this nature. I had been in selling but not in toys.

Q. What was your business prior to March, 1948?

A. Hospitalization, Associated Hospital Service.

Q. When did you decide to manufacture and promote the sale of the "Hungry Piggy" device?

A. Well, after I had taken the item around to get some public reaction, I decided in April that I would go ahead with the item and, I would say it was about the 15th of April that we arrived at an oral agreement for me to handle this item.

Q. Is that the year 1948?

A. It was, yes.

Q. Do you know what the date of the license agreement with Mr. Nudelman was?

A. Yes, the written agreement was made on May 12th, 1948.

Q. After you had made an oral agreement with Mr. Nudelman, what was the first thing that you did to promote the sale of this device?

A. Well, I had—he had several of these models made up and I had two men feel the trade out with reference to their reaction to an item of this nature or whether an

item of this nature had ever been on the market and then I subsequently went ahead with details for ordering a permanent mold and boxes and et cetera and putting the item out.

Q. Did you have some additional models made up?

A. Yes, I had the C. A. S. Plastic Company make
26 up, all told I would say, around 300 models for me.

Q. What was done with those models?

A. They were distributed by these men as well as by myself to various organizations, buying organizations for reaction and for orders.

Q. When was it that your permanent mold was ordered?

A. Well, I contracted for it, I believe it was May 13th, the day after the license agreement was signed, I contracted with Superior Plastics.

27 Q. When were your first orders for this device taken?

A. They were taken prior, in April and May orders were taken for August delivery.

Q. When were deliveries actually made?

A. The end of September.

Q. What was the reason for that delay?

A. It was probably in constructing the molds. The mold was not completed on the date it was promised.

Q. Have you, at my request, had a tabulation of the sales of this device prepared?

A. I have.

(Document handed to counsel.)

Q. How was this tabulation prepared, will you please tell the Court?

A. This tabulation was taken from our books and records of sales at the office by our bookkeeper.

Mr. Neuman: If your Honor please, I would like to mark and introduce the tabulation of sales as Plaintiffs' Exhibit 6.

The Court: Any objection?

Mr. Threedy: The only thought in my mind is that it is a little premature as I presume this evidence is tending to show the alleged commercial success.

The Court: Yes, but it does not make much differ-
28 ence as to what order he puts it in.

Mr. Threedy: No, that is right.

The Court: It may be admitted.

(Which said document, so marked PLAINTIFFS' EX-

HIBIT No. 6 for identification, was thereupon received in evidence.)

The Court: Are these dollars or cents, counsel?

Mr. Neuman: Those are units, sets.

By Mr. Neuman:

Q. In view of the Court's question, Mr. Trager, will you convert approximately into retail dollars what that number of sets represents?

A. Oh, between a hundred and a hundred and ninety-five thousand—between $180,000 and $185,000.

Mr. Threedy: I wish to offer an objection to the testimony if it is referring to the sets, because the patent is not to the set but only to one element of the set and I think it is entirely immaterial.

The Court: I do not see how it makes much difference one way or the other. Your point is that it represents more than the patent element in the suit?

Mr. Threedy: That is correct.

The Court: All right.

29 By Mr. Neuman:

Q. Well, Mr. Trager, how do you advertise the sets?

A. We circularize the trade by direct mailing, and the enclosure of brochures and literature and we advertise in trade magazines and in addition we have a promotional deal with department stores throughout the country where we allow 10 per cent off the price for advertising and they submit tear sheets of their advertisements to us.

Q. I show you what purports to be a photograph and I will ask you to explain what that is.

(Document handed to the witness.)

A. This is a photograph of the content of the box, as well as the hangar, the piggy box itself. It is what we term a glossy print and shows the item and what our retail price is.

Q. Is that a photograph of a circular?

A. This is, yes.

Q. Have you any of those original circulars?

A. We may have some in the office, I don't know, I think they were all mailed out.

Mr. Neuman: I would like to mark and offer this in evidence as Plaintiffs' Exhibit No. 7, the photograph which has just been identified by the witness.

30 The Court: Any objection?

Mr. Threedy: I wish to make the same objection, at the same time, on all of this interrogation pertaining to the sets, and the objection is that it is immaterial as the patent, as to the structure, is on only one element of the set and not the entire set.

The Court: It may be admitted and the record will show your objection.

(Which said document was marked PLAINTIFF'S EXHIBIT NO. 7 for identification and was thereupon received in evidence.)

By Mr. Neuman:

Q. I notice on this photograph, Plaintiffs' Exhibit No. 7, you show two retail prices, one of $1.39 and the other of $1.00. Will you please tell us what the two prices relate to?

A. When we originally made our plans to promote and sell this item, the large package, the five-piece set, was priced at $1.39 and the two-piece set was priced retail at $1.00.

Q. And have you maintained those prices since the inception of this device?

A. No, we have not, and as a matter of fact, all
31 orders that were accepted at $1.39 or $1.00 were rebated, or the price changed prior to the delivery date.

Q. What is the present price at which the set is sold?

A. The two-piece set retails at 79 cents and the five-piece set retails at $1.00.

Q. Will you identify this circular, please?

(Document handed to the witness.)

A. Yes, this is a circular that we used for mailing when we changed our price.

Q. That shows the new prices?

A. That is correct.

Mr. Neuman: I would like to mark this second circular as Plaintiffs' Exhibit No. 8 and offer it in evidence.

The Court: And you want the record to show your same objection?

Mr. Threedy: If you will.

The Court: All right.

(Which said document was marked PLAINTIFFS' EXHIBIT NO. 8 for identification and was thereupon received in evidence.)

By Mr. Neuman:

Q. Mr. Trager, will you tell us the reason for the reduction in prices?

32 A. As I explained, our first delivery was made on the very last day in September, and at the end of September a number of publications for the October issues are delivered, delivered in September, and as a result an ad appeared in several trade magazines showing a similar item but retailing for $1.19 and the trade canceled almost every order I had on hand and as a result it was necessary for me to make a change in price.

Q. And was that the device of the defendants?

A. Yes, it was.

Q. Which is being accused in this case?

A. That is correct.

Q. I show you what appears to be a page of a newspaper and I will ask you to explain, if you will, what that page shows?

(Document shown to the witness.)

A. This advertisement shows a picture of the "Hungry Piggy" and the bowl which is the two-piece set and retails for $1.19 which includes six cans of baby food, and this advertisement was placed by the Independent Grocers Association in their stores right alongside of the foods in their regular merchandise.

Q. Can you tell us approximately how many of these combinations were sold as the result of this advertise-

33 ment?

A. 10,000.

Mr. Neuman: I would like to mark and offer this advertisement as Plaintiffs' Exhibit No. 9 in evidence.

Mr. Threedy: May I have the same objection noted?

The Court: Yes, and the same ruling.

(Which said document was marked PLAINTIFFS' EXHIBIT NO. 9 for identification and was thereupon received in evidence.)

By Mr. Neuman:

Q. I show you a photograph and ask you to identify that photograph and explain the purpose.

(Document shown to the witness.)

A. This is a photograph of Donald O'Connor, the movie actor, and Baby Snooks, and that illustrates the use of the "Hungry Piggy" feeding, and we used it for publicity and selling.

Q. Were photographs of this character distributed for publicity purposes?

A. Yes, they were and they appeared in a great number of magazines as well as in store windows.

Mr. Neuman: I would like to mark and offer this photograph in evidence as Plaintiffs' Exhibit No. 10.

34 Mr. Threedy: Same objection.

The Court: Same ruling.

(Which said document was marked PLAINTIFF'S EXHIBIT NO. 10 for identification and was thereupon received in evidence.)

By Mr. Neuman:

Q. I show you a photostat of what appear to be newspaper clippings or portions of newspapers and ask you to identify that document and explain what it shows.

(Document handed to the witness.)

A. The item on the left appeared in the Chicago Sun-Times in their column called "Tops for Today," that is a column in which the author picks out an item that he believes is new or an innovation in any particular field, and that item there appeared in the Philadelphia Daily News. Both appeared in the month of October, 1948.

Mr. Neuman: I would like to mark and offer in evidence as Plaintiffs' Exhibit No. 11 the photostat which has just been identified by the witness.

Mr. Threedy: Same objection.

The Court: Same ruling.

(Which said document was marked PLAINTIFFS'
35 EXHIBIT NO. 11 for identification, and was thereupon received in evidence.)

Mr. Neuman: That is all of the direct examination.

Cross-Examination by Mr. Threedy.

Q. Mr. Trager, in all of the advertisements concerning which you have testified, were those advertisements of the complete sets as exemplified by Plaintiffs' Exhibits 3 and 4?

A. Yes on the advertisements.

Q. Now, did the plaintiff company, to your knowledge, ever sell separate and apart from the bowl the pig-shaped funnel?

A. It was offered separate and apart, but never sold separate and apart.

Q. It was never sold separate and apart?

A. No, sir.

Q. In other words, all of the sales made by the plaintiff company included the pig-shaped funnel as a part of the set, including all of the other elements, is that correct?

A. That is correct.

36 Q. Now, you referred to the photograph marked Plaintiffs' Exhibit No. 10, was there any compensation paid to the characters illustrated in that photograph for posing for the same?

A. No, there was not.

Q. In other words, that was done "gratis"?

A. That is correct.

Mr. Threedy: No further cross-examination, your Honor.

Mr. Neuman: No questions.

The Court: That is all, you may step down.

(Witness excused.)

DOROTHY SCHARLE, called as a witness on behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Neuman.

Q. Will you please state your name and address?

A. Dorothy Scharle, 520 North Avenue, Lake Bluff, Illinois.

Q. Are you in business, Miss Scharle?

A. I am.

37 With Nat Gavender, Incorporated.

Q. What is your position with Nat Gavender, Incorporated?

A. I am Vice-President and merchandise manager.

Q. Will you tell us briefly—tell the Court what the business of Nat Gavender, Incorporated is.

A. We represent a large group of specialty and department stores on an annual retainer basis and it is our function to seek out new items for those stores and we also buy for them.

Q. Do I understand that you find an item and then you contact your client and propose to that client that they purchase the item and sell it to the stores?

A. That is right.

Q. And in other instances you actually buy at their

request, that is, they request you to buy something for them?

A. Yes, sir.

Q. How long have you been with Nat Gavender, Incorporated?

A. Six years.

Q. By whom were you employed prior to your employment by Nat Gavender, Incorporated?

A. Butler Brothers.

Q. What position did you hold at Butler Brothers?

38 A. I was secretary to the Voluntary Chain Manager.

Q. Will you explain what the Voluntary Chain Manager is and what he does?

A. The Voluntary Chain Manager is the gentleman who heads the Ben Franklin and Federated Stores in the Chicago area.

Q. And would you sell through those stores?

A. Yes, the Federated Stores are a subscribers type of business, and the Ben Franklin Stores would be the five to one-ninety-five type of operation.

Q. And do they sell a variety of items?

A. Yes, sir.

Q. And are you acquainted with the "Hungry Piggy" device?

A. Yes, sir, I am.

Q. Can you tell the Court whether or not Nat Gavender, Incorporated has proposed the purchase of this device to clients of Nat Gavender, Incorporated?

Mr. Threedy: I object to that as being leading, if your Honor please.

The Court: Well, we may as well save time, we all understand what he is trying to get at. She may answer the question.

39 By the Witness:

A. Yes, sir, I have.

By Mr. Neuman:

Q. Can you tell us some of the clients that have followed your advice and have purchased the "Hungry Piggy" device?

A. Gimbels of New York City; Goldsmith of Memphis, Tennessee; D. H. Holmes, New Orleans, Louisiana; The Broadway Department Store of Los Angeles; Gould & Company of Lincoln, Nebraska.

Q. Miss Scharle, to your knowledge, was there available on the market prior to the summer of 1948 a psychological or utility toy offered to the retail trade for or in connection with feeding toys for children?

A. No, sir.

Q. That is, devices for children?

A. No, sir, there was not.

Q. Can you tell us if you know what was being offered prior to the summer of 1948 in connection with either toys or accessories for the feeding of infant children?

A. They did have an advertisement of drinking cups and spoons and forks with a child-like character on the end, and then they also had the round dish device that was decorated with nursery figures painted on that held hot water so as to keep the food warm for the child.

Mr. Neuman: That is all.

Mr. Threedy: I just have one question, if your Honor please.

The Court: All right.

Cross-Examination by Mr. Threedy.

Q. I believe you testified on direct examination, Madam, that you advised customers to handle the "Hungry Piggy," is that right?

A. I suggested it to them.

Q. You suggested that they handle it?

A. Yes, sir.

Q. And when you made the suggestions you had reference to the complete set such as exemplified by Plaintiffs' Exhibits 3 and 4, is that correct?

A. Yes.

Mr. Threedy: No further cross-examination.

Mr. Neuman: That is all.

The Court: Call your next witness. You may step down.

(Witness excused.)

41 GLADYS GERBER, called as a witness on behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Neuman.

Q. Please state your name and address?

A. Gladys Gerber, 928 Agatite.

Q. Do you have any children, Mrs. Gerber?

A. Yes, sir, I have two little boys, one 20 months old and one is five years old.

Q. Are you acquainted with the "Hungry Piggy" device?

A. Yes, sir, I am, I have had quite a few feeding problems with my first child, and when the second one came along it was just about the time this little gadget was popular and I purchased it at Marshall Field's, and it seemed to amuse him when I used to feed him and the pig at the same time. He never fed himself because at seven or eight months a baby is not going to feed himself and we have not had a feeding problem because I think it is a wonderful thing for feeding, feeding my little boy.

Mr. Threedy: I suggest that the witness's testi-
42 mony that the thing became popular be stricken, if your Honor please.

The Court: Yes, that may go out.

Mr. Neuman: Just that part of it?

The Court: Yes, just that part of it and tell the witness just to answer the question.

By Mr. Neuman:

Q. Please tell the Court whether you have found the "Hungry Piggy" device to be of help and useful to you in connection with the feeding of your youngest child.

A. Well, he is eating the cereals better than the first one did, and that is all I can say, it occupies his interest.

Mr. Neuman: That is all.

The Court: Do you want to ask this lady any questions?

Mr. Threedy: No cross-examination.

The Court: You may step down.

(Witness excused.)

Mr. Neuman: Shall we go ahead?

Mr. Threedy: If your Honor please, to accommodate

Mr. Neuman we have notified Mr. Eliot to be present, and Mr. Eliot's wife has been under hospital care and it is quite inconvenient for him to appear at any time. When can we have him come back?

43 The Court: How long will his testimony take?

Mr. Neuman: Not long.

The Court: All right, we will accommodate Mr. Eliot.

SOL S. ELIOT, called as a witness on behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Neuman.

Q. Will you please state your name, residence and occupation?

A. Sol S. Eliot, 1423 Sherwin Avenue, Chicago, general manager and partner of Crest Specialty Company.

Q. You are one of the defendants in this case, are you not?

A. I am.

Q. What is the business of the Crest Specialty Company?

A. We manufacture a number of specialties of wire, metal and plastic.

Q. Do you specialize in children's amusement devices?

A. We have been and we have other children's amusement devices—let me put it this way, I will amend

44 that answer—we have an infant feeding item.

Q. Mr. Eliot, how long have you been in this business that you are now engaged in?

A. About twenty years.

Q. Have you been familiar, during that twenty years, with the items which were being offered as feeding accessories or feeding toys?

A. Yes, I think I am familiar with them during that time.

Q. When did your company first place the "Puppy Tu" on the market?

A. We offered it for sale in July, 1948.

Q. Prior to July, 1948, had you personally checked the market to determine whether or not there would be acceptance for a device of this character?

A. Yes, I had.

Q. What was the nature of that survey and check?

A. Well, we were interested in an infant feeding item and we were attempting to incorporate that as a matter of appeal, something other than just a utility matter, that is the important feature of feeding.

Q. I would like to know the nature of your survey, what you did, how extensively you did it in trying to find out if such a device was acceptable.

45 A. Well, number one, we developed the model, after some development and evolution, such as you see there, the "Puppy Tu," and we then had Mr. Threedy, our attorney, make a survey at the Patent Office to see whether we would be permitted to make an item of this type, and I then proceeded to New York to make a number of calls on it.

Q. Did you find there was or was not any demand for a device of this character?

A. There seemed to be a demand.

Q. Was there a large demand or a small demand as you found it?

A. I would say just a moderate demand, just a moderate demand.

Q. Did you find that there was a substantial demand?

A. It is pretty hard to determine the word "substantial," but I thought there was a sufficient demand to go ahead with the item and invest in molds.

Q. Will you tell us what you did by way of your initial investment in your molds, and in getting under production, to endeavor to sell this item, in dollars, round dollars?

A. You are asking how much money we had invested in this item?

Q. When you started.

46 A. When we started, when we started we had nothing invested, we contracted for the molds and ordered our material and so forth.

Q. About how much did you have invested after you started, say in August or September of 1948?

A. In August I do not believe we had anything at that time.

Q. What I am trying to get at, how much money did you actually invest in this item?

A. It is pretty hard to say, I could not answer that offhand as we have a number of items and it is rather difficult for me to say what this particular item represented in dollars or cents per thousand.

Q. Would you say it was as much as $30,000?
A. I think it was under that.
Q. What?
A. I think it was under that.
Q. Is that a high figure?
A. Yes, I believe that is a high figure for that item.
Q. Did you, at the time of your survey and check of the market, form any estimate as to the number of devices like that "Puppy Tu" you could sell?
A. I thought we could sell approximately fifty to
47 sixty thousand.
Q. A year?
A. Well, the first year, anyway, because these things do not hold up too long.
Q. A year?
A. The first year.
Q. Did you estimate you could sell 90,000 a month?
A. No, it would be hard to produce 90,000 a month because you would have to manufacture sixty different molds to do that.
Q. Well, you are the same Sol S. Eliot that made an affidavit and filed it in the Patent Office in the prosecution of the Manaster patent, are you not?
A. Yes, sir, I am.
Q. And you made that affidavit under date of August 2nd, 1948?
A. Yes.
Q. I show you a photostatic copy of that affidavit and ask you whether on this photostatic page there is a reproduction of your signature?
(Document handed to the witness.)
A. Yes, that is correct, that signature is mine.
Q. Will you follow me on the reading as I wish to read to you a statement which you made at the time
48 in that affidavit, referring to the petitioner which was the Crest Specialty Company:

"Said petitioner is ready, willing and able to manufacture and sell the device of said application; that said petitioner has produced samples of said device and submitted the same to the trade and it appears thereby that there is a market for the said device and that said device can be sold and distributed and otherwise put into commerce in large numbers, to-wit, 90,000 per month, and that in order for petitioner to manufacture and sell its devices it will be obliged to expend a large sum of money, to-wit,

about $20,000 for the necessary injection molds and other tools, dies and jigs, and the like, and $35,000 in advertising, making a total of at least $55,000 as an initial investment and expenditure in marketing said device."

Do you remember making those statements in that affidavit?

A. Yes, sir.

49 Q. Were those statements true?

A. They were true to the best of our ability to determine at that time, yes, that was the proposed investment not the amount spent.

Q. You did estimate you could sell about 90,000 a month?

A. Yes, for the next few months.

Q. I show you an advertisement which appeared in "Toys and Novelties" for October, 1948, at Page—I believe it is Page 41—is that an advertisement which was put into that publication by your company, the Crest Specialty Company?

(Document handed to the witness.)

A. Yes, it was.

Q. And it relates to the "Puppy Tu" device?

A. Yes, sir.

Mr. Neuman: If your Honor please, I would like to mark this advertisement as Plaintiffs' Exhibit No. 12 and offer it in evidence, and inasmuch as I have to return this I would like to have leave to withdraw this and substitute for the exhibit photostatic copies of this page.

Mr. Threedy: No objection.

The Court: Any objection to that?

50 Mr. Threedy: No.

The Court: It may be admitted with that understanding.

Mr. Threedy: Will you furnish me with a copy of it?

Mr. Neuman: Yes.

By Mr. Neuman:

Q. That same ad appeared in other publications, did it not?

A. It might have, I do not recall the exact program.

Q. I have here Earnshaw's Infants, Childrens and Girls Wear.

(Document handed to the witness.)

Q. I show you an advertisement in the October, 1948,

edition, is that the same as the one I have previously shown to you?

A. Yes.

Mr. Neuman: That is all with this witness.

Cross-Examination by Mr. Threedy.

Q. Just one or two questions.

You stated on direct examination that before the defendant company did anything in connection with the production or sale of "Puppy Tu" as exemplified by
51 Plaintiffs' Exhibit No. 2, you had me make a search of the Patent Office records, is that correct?

A. Yes, sir.

Q. Will you tell the Court whether or not I made a report to you on that search?

A. The report was made and in it you cited the Israel Smith patent.

Mr. Neuman: I object to the witness describing it.

Was it a written document, that report?

The Witness: It was in the form of a letter.

Mr. Threedy: We will produce the letter if you wish, if you want to save time we will produce it.

The Court: I do not see that it makes any difference, let him answer the question.

To save time, you made the search of the Patent Office?

Mr. Threedy: Yes, and the Smith patent is the Smith patent that I discussed in my opening statement to the Court this morning.

By Mr. Threedy:

Q. Is it not?

A. Yes.

Q. Did the plaintiff company ever offer to sell to the trade or advertise the funnel-shape for sale, separate
52 and apart from the set?

The Court: You said "plaintiff company." Did you mean that?

Mr. Threedy: No, the defendant company.

The Court: Are you the plaintiff in the other law suit?

Mr. Threedy: No, sir, I am the defendant there, too, but I just got through a matter where I was the plaintiff.

By Mr. Threedy:

Q. Have you answered that question?

A. No, sir.

Q. And the advertisements you referred to, did such advertisements include the complete set of "Puppy Tu" which included the bowl and everything?

A. The set included the bowl, fork, spoon, case and everything in all cases, and was never offered separately.

Mr. Threedy: That is all.

Redirect Examination by Mr. Neuman.

Q. After you got Mr. Threedy's report you went ahead and filed a patent application, did you not?

53 A. I believe Manaster filed the patent application.

Q. Will you tell us whether or not Ben B. Manaster, who represents himself as patentee in Patent No. 2,453,922, is one of the defendants in this case and is a partner in Crest Specialty Company?

A. Yes, he is a partner in Crest Specialty Company, that is correct.

Mr. Neuman: That is all with this witness.

The Court: Any questions?

Mr. Threedy: No.

The Court: You may step down.

(Witness excused.)

Mr. Neuman: I want to offer in evidence as a part of my case the Manaster patent and the file wrapper of the Manaster patent, the Manaster patent as Plaintiffs' Exhibit 13 and the file wrapper as Plaintiffs' Exhibit 14.

The Court: Any objection?

Mr. Threedy: No objection.

(Which said documents were marked PLAINTIFFS' EXHIBITS NOS. 13 and 14, respectively, for identification, and were thereupon received in evidence.)

54 The Court: We will adjourn this case now until Monday morning at 10:15 o'clock.

(Whereupon an adjournment was taken in the above-entitled cause until Monday, October 24, 1949, at the hour of 10:15 o'clock a. m.)

55 Monday, October 24, 1949,
10:00 o'clock a. m.

Court met pursuant to adjournment.

Present:

Mr. Sidney Neuman,
Mr. Max R. Kraus,
Mr. Clarence E. Threedy.

56 The Clerk: David C. Trager *versus* Crest Specialty, on trial.

The Court: Whenever you are ready, gentlemen.

Mr. Neuman: I have one short witness, he was not here the other day and was not sworn.

The Court: Will you swear the witness?

(Witness sworn.)

MORRIS N. GOLDMAN, a witness called on behalf of the Plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Neuman.

Q. Please state your name.

A. Morris N. Goldman.

Q. Your address?

A. 1015 Russell Avenue North, Minneapolis, Minnesota.

Q. Occupation?

A. I am interested in several businesses.

Q. Are you acquainted with Mr. Trager who is the plaintiff in this case?

A. Yes, sir, I am.

57 Q. Are you associated with Mr. Trager?

A. Yes, we have been associated for about a dozen years, in various businesses.

Q. Are you acquainted with Mr. Ben B. Manaster, one of the defendants in this case?

A. Yes, sir, I am.

Q. Have you ever had any conversation with Mr. Manaster with respect to the "Hungry Piggy" feeding set and the "Puppy Tu" feeding set?

A. Yes, I have.

Q. Would you fix the approximate date of that conversation, the place where it was held and also tell us who was present at the time of the conversation.

A. Well, the place was the Covenant Club in Chicago, the time was—well, the exact date I do not know, but it was approximately between the 25th and 30th of August, 1948, or possibly it may have been between the 8th and 12th of August.

The reason I specify those dates is that I am in Chicago two times a month, usually between the 8th and 12th and 25th and 30th and it is, I might say, an invariable schedule.

Q. Tell us who were present.

A. There were a lot of club members there, we
58 were on the sixth floor, the lounge, where there were a lot of club members, I can give you some of the names, I do not know whether that will make any difference, do you want the names?

Q. Of the persons who were present and heard the conversation, if you can recall it.

A. I do not recall anyone that heard the entire conversation. I can recall a few names of some few who heard me start to talk.

Q. Name them.

A. Arthur Freed was one, then there was one particular member who knows a little more about the discussion because he drove me to my hotel after I left the club and I told him about it, Eli Marcus.

Q. Tell us, to the best of your ability, and recollection, the substance of what you said and the substance of what Mr. Manaster said in this conversation.

Mr. Threedy: I object to any conversation that Mr. Manaster had, I think that is not proper under the rules.

The Court: What is the theory under which you want to introduce it?

Mr. Neuman: He is the defendant and we wish to show an admission made by Mr. Manaster. He is a defendant in the case and he is a party to this action.

59 The Court: What is wrong about that?

Mr. Threedy: I think it is hearsay, your Honor.

The Court: Hearsay?

Mr. Threedy: Hearsay evidence, yes.

The Court: He is talking to one of the defendants himself.

Mr. Threedy: He is going to recite a conversation of what the defendant said and I think that what Manaster said, I think that should be brought out through Mr. Manaster himself and not through this witness.

The Court: Objection overruled, I take it the conversation has something to do with this litigation?

Mr. Neuman: Yes.

The Witness: What is the question?

Mr. Neuman: Read the question.

(Question read.)

By the Witness:

A. It started when I was talking to Arthur Freed about a different matter and during the conversation I told him I was not interested in what he had to offer, because I was interested in "Hungry Piggy."

Mr. Threedy: I object to that part of the conversation had with Mr. Freed, if your Honor please.

The Court: I thought this conversation was with
60 Mr. Manaster.

Mr. Neuman: This is preliminary, your Honor.

The Court: All right.

The Witness: I thought I was to relate the entire story.

The Court: No, not that part with Mr. Freed, that goes out.

61 The Witness: Well, I am telling about the "Hungry Piggy" set, and Mr. Manaster, who was sitting two or three feet away, comes over and says, "I am making that set."

I said, "You are making that set?" I said, "That is impossible, we have got a patent on that set."

He said, "No, you haven't."

"Well," I said, "I am sure we have, Ben too."

He said, "There is no patent on the item," and so then, rather than carry on a conversation between him and myself in front of several of the members, we went over to the side table and I said, "Ben, I am a little perturbed, I don't understand, you are making this set, how you happen to be making it."

He said, "An advertising agency in New York showed me the 'Hungry Piggy' set," and he was now making it but instead of a "Piggy" set it was a "Puppy" set.

Mr. Threedy: If the Court please, I wish to strike that part about the advertising agency in New York.

The Court: This is conversation with your client.

Mr. Threedy: I think he has stated that conversation, if the Court please, he can state what the conversation was between Mr. Manaster and himself but not between Mr. Manaster and somebody else.

62 The Court: He is still relating conversation had with Mr. Manaster. The motion is overruled.

Is that all?

The Witness: Well then I said to Ben, Mr. Manaster, that I was sorry to hear about it. He said well, he was sorry, he said, "How are you interested?"

He said, "I thought you were in a different business."

I mentioned one of my partners was interested in this thing, therefore I was interested. He said if he had known it was mine he wouldn't have gone into it.

I thereupon said to Ben, I said, "Ben, why don't we get together and discuss this thing?"

He said, "Fine, I will call you, maybe Mr. Trager and you and I will have lunch," with him the next day.

By Mr. Neuman:

Q. Did you have any further conversations with Mr. Manaster?

A. For the next three or four days, I saw him at the club the day after, he said he was sorry, he meant to call but something came up but he would call me the next day; a day or two later I saw him again at the club and he said he had to take his mother to a funeral.

63 The Court: Did you have any further conversation with him about this matter?

The Witness: No.

Mr. Neuman: That is all.

Mr. Threedy: No cross-examination of this witness, if the Court please.

(Witness excused.)

Mr. Neuman: In closing our case, if your Honor please, I wish to have marked as an exhibit an illustrated chart or an illuminating chart which I have had entitled "Plaintiffs' Chart Showing Infringement of Claim 3 of the Nudelman Patent."

I wish to further explain that I have shown upon this chart Fig. 3 of the Manaster patent, No. 2,439,22 and have removed therefrom the reference numerals which appear in the patent drawing.

I show that figure as illustrative of the accused device in this law suit.

Mr. Threedy: If your Honor please, as counsel states he is going to use this chart for argument, we will object to it on the ground there has been no proper foundation laid for it.

We have never seen the chart before, we don't know whether it is a correct interpretation of whatever
64 it is supposed to represent, but if I understand correctly, if counsel merely wishes to use it for the purposes of argument, we have no objection to that.

However, we are not admitting by that statement it is a correct illustration or that we are bound by anything that the chart contains.

The Court: Without any further showing, why is this chart competent as an exhibit?

Mr. Neuman: Your Honor, infringement is proved by putting the patent in evidence and putting the accused device in evidence and sometimes it becomes necessary to call an expert witness and go through the Sworn argument procedure of having that expert witness read the claim upon the accused device.

In this case I don't think that is necessary; in this case I have taken our claim and serialized it and applied it to the accused structure.

The Court: That is what you say you have done and that is what he is objecting to, you have no showing here under oath as to what you say has happened.

Mr. Neuman: I had this prepared under my own direction.

The Court: I understand that, still it does not become evidence, does it, merely because you state that?

Mr. Neuman: I don't think so but then what I want
65 to do is offer it as an illustrated and argumentative chart.

The Court: If you are just going to use it for your argument, he says he has no objection to it, but he does object to it as a regular exhibit, isn't that correct?

Mr. Threedy: That is correct, your Honor.

The Court: Anyway we are wasting time, you can use it in your argument and you can have it here and look at it.

Mr. Neuman: That closes our case in chief.

The Court: All right.

(Thereupon plaintiffs rested their case in chief.)

(Thereupon defendants to maintain the issues on their part introduced the following evidence, to-wit:)

Mr. Threedy: If your Honor please, I have here a book of prior art patents which I will ask the reporter to mark. Mark it Defendants' Exhibit No. 1.

(Said document was marked Defendants' Exhibit No. 1 for identification.)

66 Mr. Threedy: This book contains, if your Honor please, soft copies of the following patents. I will refer to them by their numbers, 226,831, 356,168, 842,024, 1,751,773, 2,207,417, also for the Court's convenience it contains a copy of the patent in suit.

I would like to offer this book in evidence as Defendants' Exhibit No. 1.

The Court: Those are the prior art patents supporting your position?

Mr. Threedy: That is correct, your Honor, yes.

The Court: Any objection?

Mr. Neuman: No.

(Which said document, so marked DEFENDANTS' EXHIBIT NO. 1 for identification, was thereupon received in evidence.)

Mr. Threedy: Shall we just retain it, or—

The Court: You had better retain it.

Mr. Threedy: At this time, if your Honor please, I would like to call as a witness for the defendant, Mr. Snow.

67 WILLIAM A. SNOW, called as a witness on behalf of the Defendants herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Threedy.

Q. State your name, address, age, business and business address.

A. My name is William A. Snow, 4958 North Tripp, Chicago, Illinois, my home address; my business address is 7 South Dearborn Street; I am a patent lawyer and I have been associated with my present firm, Rummler, Rummler & Snow, for the past twenty-five years.

Q. You are a member of the Bar of the State of Illinois, Mr. Snow?

A. I am.

Q. Are you registered as a patent attorney and lawyer in the United States Patent Office?

A. I am.

Q. How long have you been registered as a patent lawyer in the United States Patent Office?

A. Since 1931.

Q. As a registered patent lawyer, Mr. Snow, what
68 has been in general the nature of your business?

A. I have done everything in a patent organization, that an organization of our size has done in connection with patents, that is, prosecution, preparation and prosecution of patent applications, rendering patentability searches, infringement searches, validity searches, handling of litigation for both the plaintiff and for the defendant.

Q. Have you ever testified as an expert in patent cases before, Mr. Snow?

A. Yes, I have.

Q. When was the last case you testified in as an expert?

A. The last case was before the Hon. John P. Barnes of this Court in the case entitled Madison Patents Corporation. There were five suits, four suits I believe there was, filed by the Madison Patents Corporation and they were consolidated for trial and tried as one case in April of this year.

Q. Is there anything you would like to say, Mr. Snow, that might have a bearing upon your qualifications, to enable you to testify as a patent expert in patent cases?

A. I believe I am qualified in that I have been performing patent work and patent opinion work and that sort of thing for many, many years and in addition thereto
69 I have taught patent, trade mark and copyright law at the John Marshall Law School in Chicago.

Mr. Neuman: When was he admitted?

When were you admitted to the Illinois Bar?

The Witness: 1944.

By Mr. Threedy:

Q. Do you have a copy of the Smith patent No. 2,207,417 dated July 9, 1940?

A. I do.

Q. Have you read and examined the Smith patent in question?

A. I have.

Q. You understand the construction and operation of the device shown therein?

A. I have and I do.

Q. Do you have a copy of the Nudelman patent No. 2,455,266, in suit?

A. I have.

Q. Have you read and examined that patent and do you understand the construction and operation of the device shown in that patent?

A. I do.

Mr. Threedy: May I ask the reporter to mark this chart for identification as Defendants' Exhibit No. 2?

70 (Said document was marked Defendants' Exhibit No. 2 for identification.)

By Mr. Threedy:

Q. Mr. Snow, I hand you this chart which has been marked for identification as Defendants' Exhibit No. 2 and ask you to examine the same and state whether or not you can identify it?

(Document handed to the witness.)

A. I can, this is a chart which was prepared under my supervision and at my request which illustrates that—I have a copy, your Honor, would you like to look at it?

Mr. Threedy: I have a copy.

By the Witness:

A. That is an exhibit in the case which illustrates on here in the upper lefthand corner Figure 5 of the Nudelman patent in suit. It was taken directly out of the patent in suit.

On the lefthand side I have the illustrated Figure 4 of the Smith patent.

The Court: Lefthand side or righthand side?

The Witness: Righthand side, your Honor, I am sorry, the righthand side is the Smith patent and the lefthand side is the patent in suit.

71 By the Witness:

A. I have colored the bowl with the color blue and the hopper or figure, if you want to call it such, in red.

Below, in the center of the page, I have Claim 2 of the Nudelman patent in suit typed and broken down into elements and on the lefthand side of the broken down claim I have indicated the numerals which appear in the drawings, in the lefthand side the numerals relate to the Nudelman patent Figure 4, and on the righthand side the numerals relate to the Smith patent, 2,207,417, with the one

exception of the use of the numeral "M" or we will say the letter "M" and the letter "P", which refers to the Smith patent, otherwise the numerals appear there as shown in the patent in suit and the Smith patent.

Mr. Threedy: I will ask the reporter to mark this cereal bowl for purposes of identification as Defendants' Exhibit 3.

(Said article was marked Defendants' Exhibit No. 3 for identification.)

Mr. Threedy: I also ask the hopper be marked for identification as Defendants' Exhibit No. 3-A.

72 (Said article was marked Defendants' Exhibit No. 3-A for identification.)

By Mr. Threedy:

Q. Mr. Snow, I hand you the cereal bowl marked for identification Defendants' Exhibit No. 3 and also the hopper marked for identification Defendants' Exhibit 3-A and ask you to state if you can identify those exhibits.

(Articles handed to the witness.)

A. Defendants' Exhibit No. 3 is an ordinary cereal bowl which was purchased on the open market, and the Defendants' Exhibit No. 3-A is a model which was made at my direction and under my supervision to illustrate Figure 4 of the Smith patent, 2,207,417, and I believe it is a correct representation of that figure.

Q. Now, by means of the chart, Mr. Snow, Defendants' Exhibit No. 2, and the cereal bowl and hopper, Defendants' Exhibit Nos. 3 and 3-A for identification, will you explain and compare the device of Claim 2 and that shown in Fig. 4 of the Smith patent, 2,207,417?

A. Will you please read the first part of that?

(Question read.)

A. Referring to Defendants' Exhibit No. 2, your

73 Honor, which is this chart, I have handed you, every element of Claim 2 as is shown in this chart is found in both the patent in suit and the Smith patent, particularly the Smith patent which I believe is—shows everything called for in Claim 2 and thereby completely anticipates Claim 2.

Mr. Neuman: If your Honor please, I object to that answer. The function of the Court is to determine whether or not there is any anticipation here. As I understand, the province of an expert, he merely explains terms of art and explains structures to your Honor, but he cannot

come in here and give his opinion as to the vital issues in the case.

I think Mr. Snow should be confined to explanations of the structures.

The Court: I think that objection is well taken. He can compare the structures.

The Witness: That I will do, your Honor.

Referring to the chart and taking them element by element, an amusement device, comprising the first element which this claim contains is the figure, the phrase "formed to simulate a living creature," although those words are in there, I don't believe it changes the function of the de-
74 vice in any way, so I am just going to refer to it as a figure.

Mr. Neuman: I object to that, if your Honor please, the claim as issued to us by the Patent Office used in it as an element a figure formed to simulate a living creature.

The Court: I understand that.

Mr. Neuman: He is now reading that out of the claim.

The Court: He admits that the exhibit shows he reads it out. Go ahead.

The Witness: The figures shown in the Nudelman patent in suit by the numeral 10 which your Honor will see just below the numeral 20 on the righthand side of the drawing, generally indicates the entire figure. In the Smith patent our numeral 10′, appearing at the upper end of the hopper, is generally used to indicate the figure.

Mr. Neuman: If your Honor please, I am not interrupting on account of his answer, but I made an objection before when the witness used the expression "completely anticipated." I don't know whether in view of the objection I made and the fact that your Honor agreed with me, with my objection, whether that means that characterization by the witness has to go out.

The Court: Yes, it does mean that.

75 Mr. Neuman: All right.

The Court: All right, let us proceed.

The Witness: The next part of that claim reads: "Said figure comprising a body portion adapted to be placed exterior of the feeding bowl."

Now, the body portion is indicated by the numeral 16 in the Nudelman patent, the lefthand figure, it is the last figure, the last numeral shown on the drawing as the lowest part of it and on the Smith patent the body portion

is indicated by the numeral 12′ or by the numeral 23, or by both of them.

Both of these parts, indicated by 12′ and 23, are adjacent to the exterior of the feeding bowl which is indicated by the numeral 22, in the Nudelman patent, and by the numeral 6′ in the Smith patent.

"Said body portion having a forwardly extending portion," a forwardly extending portion in the Nudelman patent in suit, Figure 5, as indicated by the numeral 27; that 27 appears just to the right of the bowl on the right-hand side of the portion in red, and in the Smith patent it is indicated by the numeral 16 which is on the lefthand side of that drawing and the lead line runs to the right portion through the blue.

Do you find it, your Honor?

76 The next part of that claim reads: "adapted to extend closely adjacent to and overlie a portion of said bowl."

The part 16 in the Smith patent is adapted, that line—rather, I should say, extends closely adjacent to and overlying the portion of the bowl—

In the patent in suit it is obvious that the portion marked 32—wait a minute, I am sorry, I am too far—the portion marked 27 is adapted to extend closely to and overlie a portion only of said bowl.

The next element of the claim is that said "forwardly extending portion having a simulated mouth."

In the Smith patent in suit—in the Nudelman patent in suit, the mouth in indicated by the numeral 32 it is right under the nose of the pig.

The Court: I see it.

The Witness: In the Smith patent, 2,207,417, it is indicated by the letter "M," being that portion thereof, and the next element is "having a passage," the passage is indicated by the numeral 24 in the Nudelman patent in suit and in the Smith patent it is indicated by the letter "T."

"Said passage having walls extending solely downwardly," the walls in this instance are the walls 25,

77 indicated in the Nudelman patent, the 25 which is right above the figure 5, and in the Smith patent the walls is indicated by the numeral 14 appearing in the middle of the red portion.

Reading the claims further, it says, "The walls extend-

ing solely downwardly from said mouth through said forwardly extending portion whereby the contents of a spoon may be emptied through said simulated mouth and fall by gravity into said feeding bowl."

It is obvious from the drawing that any contents that are placed in through the mouth of either one of these devices, enters through the mouth and will flow downwardly through the forwardly extending portion and into the bowl by gravity.

The last element is "Said forwardly extending portion including means preventing lateral movement of said passage from said bowl."

In the Nudelman patent in suit this means is indicated by the numeral 20, which is the undercut portion, it appears right below the word "Fig." in the Nudelman patent, Figure 5, and in the Smith patent it is indicated by the numeral 22, the 22 is in the center of the chart.

By Mr. Threedy:

78 Q. Mr. Snow, state if you know what difference, if any, there is between Claim 2 and Claim 3 of the patent in suit.

A. Claim 3 is identical with Claim 2, word for word, with the exception of the following words, appearing on Page 2 of the specification of the Nudelman patent, beginning on Line 5 and ending on Line 7, these words are: "And a head secured adjacent to said forwardly extending portion and movable to permit the contents of a spoon to be emptied into said simulated mouth," End of the additional written matter.

Q. With that difference in mind, Mr. Snow, would you say that the function of the portion or Smith hopper, patent 2,207,417, would be altered, changed or modified in any respect by the addition of a head of a hog to the Smith hopper?

A. No, I do not believe the function would be changed one iota.

Q. Does the addition of a hinged head to the patent structure in any way change, alter or modify the structure of the passage of the patented device in its function of delivering food to the bowl through the passage?

A. No, it does not change the function of that
79 passage one iota.

Q. Would the addition of a hinged head to the hopper of the Smith patent, 2,207,417, in any way change,

alter or modify the function of the groove, 22, in wall portion, 23, and edge, 24, of the bowl by providing a detachable connection between the hopper and the bowl?

Mr. Neuman: Will you read that question?

(Question read.)

By the Witness:

A. No, the addition of a hinged head to the device of Figure 4 of the Smith patent would not change the function.

By Mr. Threedy:

Q. Now, I ask you that same question with respect to the patent in suit, in so far as it relates to the groove, 22, in the edge of the bowl, 20—rather, groove, 20, in the edge of the bowl, 22?

A. No, the addition of a head, a hinged head or a head, does not change the function at all.

Q. Mr. Snow, have you read the file wrapper history of the patent in suit?

A. I have.

Q. Do you understand its contents?

A. I do.

Q. Now, in your examination of that file wrapper history, what, if anything did you find contained therein
80 as indicating to what the applicant asserted to the Examiner as his contention of novelty of this invention over the prior art contained in the file wrapper?

Mr. Neuman: I am going to object to that; the file wrapper proceedings speak for themselves. I don't think this witness should be permitted to argue from statements which are found in that file wrapper. It is most unusual, as far as I am concerned in this line of work.

The Court: What is in the file wrapper speaks for itself.

Mr. Threedy: My purpose here is to find out the particular spot. I am perfectly satisfied if counsel is, but I thought it would facilitate matters if we understood what we mean when we talk about it later on.

Mr. Neuman: I always do things of that sort in argument.

The Court: Objection sustained.

By Mr. Threedy:

Q. Have you examined any of the prior art patents that have been cited in the file wrapper history of the patent in suit, Mr. Snow?

A. I have.

Q. In your opinion, based upon that examination of these prior art patents, cited by the Examiner, do they disclose a body simulating a living creature and having attached thereto a hinged head?

81 A. Yes, there are several patents that contain that function. For instance, the Bowen patent shows the figure of a dog which has a head hinged to the body, and when a coin is placed on the nose of the dog and the tail is actuated, the head will shift upwardly and the coin will tumble right off the nose of the dog and fall in a trough and when the tail is released the coin will fall, by gravity, down through the body of the dog into a receptacle.

The Livingston patent, 842,024, I don't recall whether I gave you the number of the Bowen patent, it is 226,831, granted April 27, 1880—

The Livingston patent, 842,024, granted February 5th, 1907, discloses a simulation of a horse eating at a trough and it contains an arrangement which moves about, and portions of the horse are actuated by striking the head whereby the head is oscillated around the shaft "F" and the food appears to be projected into the mouth of that horse and at the same time, because of the width of the food on the chain or cable, the trough appears to open and shut, and the head is hinged, the head is hinged to the body of the animal, so that that gives a movable head.

82 Mr. Neuman: If your Honor please, this Livingston patent, while it was in the file wrapper references cited by the Patent Office against these claims, it has not been pleaded in the answer as an anticipation.

Now, I am willing to have the witness refer to it and describe it, but I think it should be understood it is used only to show the prior state of the art.

The Court: That is all he asked him about.

Mr. Neuman: It cannot be used to anticipate our claims, here, because it has not been pleaded as an anticipation.

Mr. Threedy: I am submitting it under the rules announced by the Circuit Court of Appeals, your Honor, which held prior art patents may be offered in evidence to show no invention, without being pleaded.

The Witness: And in the Trosper patent, 1,751,773, dated March 25, 1930, discloses several figures simulating a living person or, for instance, a doll or the head of a dog, a duck, are shown in the drawings as embodying the

movable head portion, which are portions of the body and actuate it so the head moves, the mouth moves, to indicate the opening of the mouth.

Mr. Threedy: Mr. Neuman, I will call your attention and the Court's attention to the fact the Livingston
83 patent was set up in the prior art patents in connection with the petition for declaratory judgment.

By Mr. Threedy:

Q. I will hand you a copy of United States Patent No. 1,792,129, that is a photostatic copy, and which patent I will ask the reporter to mark as Defendants' Exhibit 4 for identification.

(Said document was marked Defendants' Exhibit No. 4 for identification.)

(Document shown to the witness.)

Q. Have you read and understand the disclosure of that patent, Mr. Snow?

A. I have read it and I do understand it, yes, sir.

Q. Now, does that patent which you are referring to, disclose a hinged head?

A. It does.

Q. Is there anything stated in the specification with respect to the construction of that head and if so, state what is stated.

A. Column 1 on Page 1 of the specification, Line 46, it says that the head, 12, is hinged to the body, that 13 provides a means for mounting the head in natural position on the body, and the head is provided with passage
84 15, communicating with the hollow of the body.

Mr. Threedy: If your Honor please, I would like to offer in evidence—

Mr. Neuman: Just a minute, please.

Mr. Threedy: I am sorry.

Mr. Neuman: I want to get the record straight.

This patent in question cannot be used as anticipation, it may only go in to show the state of the art, it was not pleaded in the answer, neither was it pleaded in the petition.

Mr. Threedy: That is right.

Mr. Neuman: We are seeing this one for the first time today.

Mr. Threedy: That is right.

If your Honor please, I would like to offer in evidence

the chart, Defendants' Exhibit No. 2, and also I would like to offer in evidence the cereal bowl and this hopper as Defendants' Exhibits Nos. 3 and 3-A.

I would like to offer in evidence a copy of Patent No. 1,792,129, as Defendants' Exhibit No. 4, which the witness has just referred to and we ask that the file wrapper history of the patent in suit be marked as Defendants' Exhibit No. 5, and I would like to offer it in evidence.

Mr. Neuman: With respect to that offer—

85 The Court: I don't quite get the distinction in the patent laws about that.

You say this last patent counsel produced is introduced for the purpose of showing the condition of the prior art and not showing it anticipates the invention claimed or granted. What is the difference?

Mr. Neuman: Your Honor, the difference—the defense of anticipation is a defense of a lack of novelty and when we say this patent cannot be used to anticipate, it means that this patent cannot be used to show the device was not new. They can use it for other purposes, they might want to show that Mr. Snow, as an expert, a patent expert, takes this and combines it with some others and builds up a case of lack of invention and say there is nothing inventive in what we did. They can use it for that purpose but they cannot use it to show the device is not a new device within the meaning of the patent statute and that is why the rule that requires notice at least thirty days prior to trial was a very important rule.

The Court: In the final analysis I don't see a whole lot of distinction.

Mr. Neuman: There is a big distinction, your Honor, there is a real distinction. While we can have a de-

86 vice which is new and useful, we have also to have, in addition to those two requirements of the statute, we have to have the third requirement of invention. Those are three separate elements, three separate factors, which go to make up patentable novelty.

Anticipation only relates to the novelty feature of the statute. They have to show that there was no invention in doing what we have done. As I said in my opening statement, they have used a lot of prior art and dragged a lot of things in here and say there is no invention in making anything in that shape, that this is not a new device.

Mr. Threedy: Of course I don't agree with that, Mr. Neuman.

The Court: It is not a new device, you mean it was not an invention?

Mr. Neuman: No. We have to take these things analytically, first, novelty, second, utility, and third, was it inventive?

First, as far as novelty and utility, I will argue, when we come to argue the case, that that is not really a question, novelty and utility; but I will also argue there is patentability.

The Court: Something new could be useful and not
87 an invention.

Mr. Neuman: Yes, but you and I and Mr. Threedy would be disagreeing with the Patent Office when we do that, they felt this was inventive.

The Court: I appreciate that but I say as an abstract proposition, you may have something new which is not an invention.

Mr. Neuman: Yes, that is right, you can have something which is old and it can be an invention, too.

The Court: Yes, I understand that.

Mr. Neuman: But you must have novelty, utility and inventiveness.

The Court: It must be useful and it must be novel and it must be an invention.

Mr. Neuman: That is right.

The Court: I still don't quite get through my mind the distinction between what the condition of the prior art is and what anticipates it.

Mr. Neuman: Because there are a lot of things in the prior art which throw light on the subject, on a given subject, but there can be only one patent or one description in and of itself disclosing the entire combination or the device itself.

You cannot combine references, you cannot take a
88 head of one and a body of another or a foot, all of which come from separate patents and put them together and say that is the device of the patent in suit.

The Court: I understand that.

Mr. Threedy: That is not a correct statement of the law.

Mr. Neuman: That is my understanding of the law.

The Court: Go ahead now, what is next?

Mr. Threedy: I want it understood the fact that I am not responding to Mr. Neuman is not an admission.

The Court: I understand, we just perhaps improperly injected it into the case, that is not part of the case.

Mr. Threedy: I believe I have offered in evidence a certified copy of the file wrapper of the patent in suit as Defendants' Exhibit 5; I believe I have offered it and I believe I have also offered the patent as Defendants' Exhibit 2.

(Which said documents, marked DEFENDANTS' EXHIBITS Nos. 2, 3, 3-A, 4 and 5 for identification, were thereupon received in evidence.)

Mr. Threedy: You may cross-examine.

Mr. Neuman: May we have a recess for a few minutes?

89 We would like to compare these.

The Court: We will recess for a few minutes.

(Whereupon a short recess was taken.)

90 *Cross-Examination by Mr. Neuman.*

Q. I understood you to say that you had read and you understand the Nudelman patent in suit?

A. Yes, sir.

Q. Will you take that patent and refer to it and describe the manner in which that device is operated—does your Honor have a copy of that?

The Court: Which?

Mr. Neuman: The Nudelman patent, the patent in suit.

The Court: It is attached to the Bill of Complaint, isn't it?

Mr. Neuman: I put it in as an exhibit.

The Court: Is it attached to the Bill of Complaint?

Mr. Neuman: Yes, I think so.

The Court: All right.

By the Witness:

A. The patent describes, the patent in suit describes two different heads, and describes the operation as being the—reading from the page of specifications, Column 1, Line 49:

"The head 12 is pivotally hinged to the body portion at rear thereof by any suitable hinge 14 to permit the head

91 to be tilted backward as shown in Figure 3 to expose the opening 26, and permit the contents of the spoon

to be emptied into the hollow body, 24, and from which it passes into the bowl, 22."

Then with reference to the modification it says the head is integrally formed on the body. It says the head can be made of one piece.

Reading from Column 2, Line 7, it says:

"If desired this device can be made of one piece as shown in Figure 5, where the head and body are integrally formed at 30 with the mouth portion, 32, open permanently so as to receive the contents of the spoon."

By Mr. Neuman:

Q. Now will you explain to the Court what the purpose of the device of the patent in suit is and how it functions?

A. The function of this device is merely to pass food which is taken from the bowl or the contents or whatever is in the bowl taken up on a spoon and emptied into the passageway indicated by the numeral 24 so that the contents will pass back into the bowl.

Q. The food is normally in the bowl, is it not?

92 A. That is correct.

Q. And in the process of use you finally reach the point where you have continuously taken food from the bowl and deposited it into the mouth of the figure and it is moved back to the bowl and after one continuous operation you will have emptied the contents of the bowl?

A. One continuous operation, you mean constantly until the bowl is empty. This indicates that the food taken from the bowl is returned to the bowl for gradual consumption by the person using it.

Q. For the moment let us assume, Mr. Snow, that you are not a patent expert but a mother feeding her child or a father feeding his child, will you now take this "Hungry Piggy" set and show the Court how that device is operated.

A. It is very simple. Assuming there is food in the bowl it is picked up, placed into the hopper here (indicating) so it passes from the mouth downwardly into the bowl.

Q. Now, you have also read and understand the Smith patent, No. 2,207,41[illegible]

A. That is correct.

Q. Will you refer to that patent and explain to the Court how that device is operated?

I gather from your direct testimony you were concerned

only with the structure and you did not explain the
93 operating principle or the operative purposes.

A. No.

Q. Will you do so now?

A. The patentee in this case stated the purpose of this invention—and I am reading from Column 1, Page 1, Line 3:

"It is the purpose of my invention to provide a cereal bowl that comprises a liquid receiving bowl portion and a cereal receiving hopper portion, that are so relatively arranged and located that any dry, loose cereal that may be placed in the hopper portion will be fed into the liquid retaining portion by gravity as the cereal is eaten from the liquid receiving portion of the device, or otherwise moved away from the discharge opening of the hopper. Cereals that are pre-cooked or otherwise prepared for eating in a dry state, are usually in the form of granules, flakes or other particles, that are readily fed by gravity from a hopper."

Q. I don't know whether it is clear or not, at least it
94 is not to me, I know what is in the patent, but I would like you to tell the Court how that device is used.

A. From the modification or description of the specific embodiments shown in the drawing, the patentee, in this case, discloses one method of utilizing this invention by this description here wherein the inventor states he places the dry cereal or pre-cooked cereal in the hopper, plus the fluid, something like milk, for instance, in the bowl and then as it is withdrawn when the contents are withdrawn by means of a spoon or something like that, the material will fall by gravity down into the bowl.

Q. He does not work from a storage bin or a hopper, he takes the contents from the bowl?

A. That is correct, the same as you take it from the bowl here in the patent in suit.

Q. Did you instruct a model maker as to the preparation of the hopper, which is Exhibit 3-A?

A. That is correct.

Q. Did you draw the device for him?

A. No, I gave him a copy of the Smith patent, Figure 4 thereof, which discloses the embodiments that he made this model from.

Q. Did you indicate the size that he should make, the size in which it should be made?

95 A. No, that I left to his discretion, giving him the drawing.

Q. In your opinion, is the hopper operative for the purpose intended by Mr. Smith in his patent?

A. Yes, definitely.

Q. Have you tried it to see whether it works?

A. It is obvious, it is so simple.

Mr. Neuman: There are a lot of things which may be obvious apparently, but which are shown not to be obvious.

By Mr. Neuman:

Q. I wonder if you would take this box of dry corn flakes—it is true, is it not, that Mr. Smith is interested in flakes and other dry cereals?

A. He said "dry cereal," he did not mention anything but dry cereal.

Q. He mentioned flakes.

A. I assume that would be called dry cereal, I also presume it would mean pre-cooked.

Q. I show you Line 14 of the first column, it says "cereal" and also "flakes."

A. Line 14?

Q. Yes.

A. That is correct.

96 Q. So, flakes would be among the dry cereals which he intended to be used in his device?

A. I would assume so, that is one food; he calls for others, too.

Q. Would you mind pouring some of those into that hopper?

A. No, sir.

(Witness does as requested.)

Q. Now, as I understand it, Mr. Smith pours the cream into the bowl, does he not?

A. Yes.

Q. Would you mind doing that?

A. No.

(Witness does as requested.)

Q. Now, will you show the Court how that device works, how it can be made to work according to the patent?

A. According to the patent the idea is that the material is supposed to flow down through the bottom, down here, and be picked up by the mother or whoever is feeding the child. This is, of course, a dry flake and that is apparently one form that will come through, apparently, but the patent

does not call only for dry flakes but pre-cooked cereals as well.

Q. But flakes are one of the dry cereals his device
97 is intended to be used for?

A. That is correct.

Q. Will those come out through there?

A. Yes.

Q. Have you read Smith's patent?

A. I have.

Q. Are you supposed to have much cream in there?

A. It says to put a quantity of milk or cream in the bowl.

Q. And you have covered the opening at the bottom of the hopper, haven't you?

A. I have.

Q. Will you refer to the Smith patent?

A. Yes, it says, on Page 2, Column 1, of the Smith patent:

"The preferable way of using the bowl is to fill the hopper portion with dry cereal to the extent desired, and then add milk or cream as desired, in the bowl portion, 6." Period and end of paragraph.

Q. What lines are you reading?

A. Column 1, Page 2, Line 27, the sentence beginning with Line 27.

98 Q. Will you also refer to Line 17 in that same column and read that material?

A. Well, "While ordinarily a person," is that the part?

Q. Yes.

A. (Reading):

"While ordinarily a person would not place any more liquid in the bowl than would reach to the bottom edge, 19, of the opening, 9, yet if more liquid should be added after cereal has flowed into the bowl portion, from the hopper portion, the cereal itself will prevent the liquid from entering the bottom portion of the hopper to any material extent, as dry cereal will continue to flow into the bowl portion as rapidly as it is removed with the spoon."

And then I read the next sentence, "The preferable way—" and so forth.

Q. And when you cover the opening here you have some liquid in the bottom of the hopper?

A. That is right, a small portion, because it has an inclined wall.

Q. Mr. Smith did not want that?

99 A. I just read that portion about the preferable way of putting milk or cream in it. That is one way, I agree with you that that could be used by putting a small portion of the milk or cream in that so that the material will not become soggy.

Q. And in using that device you do not take a spoon and some cereal and cream and put it back into the hopper?

A. The patentee did not say that that was the purpose.

Q. Did he suggest that?

A. No, he did not expressly say so.

Q. Do you find any suggestion of him doing that in there?

A. No, sir.

Q. You do not find any hint of such use of the device, do you?

A. No, sir, except this in Column 1, on Page 1 of the specifications, beginning of Line 39, says:

"It is also a purpose of my invention to provide a cereal dish of the above mentioned character, which, due to the movement of the cereal into the liquid receiving portion will interest the child eating cereal, in the operation of eating the same, to an extent that would not otherwise

100 exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereals by arousing their interest in the process of eating the same."

Q. He is referring there to the operation which we have in the actual exhibit with the hopper filled and food being taken from the bowl and put directly into the mouth of the child?

A. That is correct.

Q. You do not suggest by that that he is suggesting the Nudelman patent?

A. No, sir.

Q. The mechanics of that operation is interesting?

A. I do not follow you.

Q. The mechanics of his operation would be of interest to the child?

A. That is correct, the same as the cereal being delivered into the hopper and then back into the bowl.

Q. Now, will you take a spoonful of cream and the flakes as they are here and put them in there, do it several times.

The Court: Put them into where?
Mr. Neuman: Into the hopper.
101 The Court: All right.
(Witness does as directed.)

By Mr. Neuman:

Q. Will those flakes now come through from the hopper into the bowl?

A. Those that I deliver from the bowl.

Q. How are you going to get those flakes down into the bowl?

A. I do not know, I imagine they will fall down here eventually, there is so much cream in there I don't know whether they will come through or not, whether those flakes are coming through there now or not. I don't know, I am trying to remove these I see here, to see.

I do not know whether they are coming through or not. I cannot answer that.

Q. Is that supposed to gravitate down into the bowl?

A. That is correct.

Q. But so far as you know, that is not occurring right now?

A. What is that?

Q. But so far as you know, that is not occurring right now?

A. So far as I can see, I cannot answer the question. It does not look like it is occurring.

102 Q. That hopper you describe is a storage bin, is that not correct?

A. A hopper is a funnel. A normal hopper is not a storage bin, an ordinary definition of a hopper is a funnel like apparatus, and as Webster puts it, "a hopper is usually of a funnel like appearance."

Q. But in this case it is used as a storage compartment?

A. More or less, yes.

Q. Is the Nudelman device used as a storage compartment?

A. No.

Q. Mr. Snow, in your opinion, if you use a cooked cereal such as Cream of Wheat or Oat Meal or the baby food called Pablum, would you feel with that hopper as your model maker made it up that that would come back into the bowl, assuming now that you were going to try to use it for the Nudelman purposes?

A. I think it would work much better than this because it is in fluid form, and it is not a heavy body such as Corn Flakes.

Q. But you do have a heavy consistency to your cooked cereals?

A. Not when you feed it to children, you would feed
103 it to them in a very thin form to eat to aid them in masticating it.

Q. In the Nudelman device you have almost a straight drop to the bowl from the mouth of the device?

A. That is right.

Q. Whereas in the Smith patent you have that long wall which he describes for a bottom wall?

A. That is correct.

Q. Will you refer to the Smith patent and read his description as to that wall, referring particularly to Line 49, Column 2, Page 1, where he speaks of the wall?

A. (Reading.)

"The inclined wall portion, 12, has an inner inclined face, 14, having a portion that approaches straightness, between the top and bottom ends thereof, and is concavely curved at 15 near the top end thereof."

Q. And don't you think that your cooked cereals would deposit on that wall which he speaks of as having long straightness or having straightness rather than getting back into the bowl, if you are going to try to use it for the Nudelman function?

A. No, sir, I do not agree with you, Mr. Neuman.

Q. Will you refer to your chart, Defendants' Ex-
104 hibit No. 2?

A. Yes, sir.

Q. I call your attention to the fact that Column 2 speaks of "Said figure comprising a body portion".

A. Yes.

Q. What is your understanding in the light of the Nudelman specification, what he means by a body portion?

A. The body portion is the entire matter colored in red.

Q. You mean this entire figure (indicating)?

A. I am sorry, I was thinking of the figure.

Q. That is—all right.

A. The body portion is indicated by the numeral 15. It is that portion which is adapted to be placed adjacent to the exterior of a feeding bowl.

Q. And isn't the Nudelman body portion the figure which is indicated by the reference numeral, 10?

A. The specification refers to the body as the body being indicated by the numeral 10, that is the general numeral applied to the overall figure.

Q. No. He refers to that as the body portion, No. 10 as the body portion. You say he refers to the body as No. 10, but the reference to the body portion is No. 10, and if you will look at Line 24 he has defined what the body portion is, and that is the same language you will
105 find in the claim, isn't it?

A. Yes, that is correct.

Q. Then that reference to character 16 on your chart is not accurate, is it?

A. Yes, I think it is still accurate because you have to have a numeral for the figure and if you do not have a numeral for the figure, it is one of the elements of the column you are not going to be able to read, that is, the column on the drawing.

Q. The figure is the entire figure which would be the body portion, 10, and the head. You could have used that for the first element?

A. No, because it says: "Said figure comprising the body portion", so the figure has got to be something and the body portion something else.

Q. You are just taking the reference he used to describe the concave surfaces or the belly portion of the body?

A. Yes, otherwise I would have to apply a whole new numeral. I am using your numeral.

Q. You should have used 10 for the body portion?

A. If I did I would have to use another numeral for the figure which I would have to supply.

Q. What is your understanding, apart from the
106 Nudelman specification, of the meaning of the term "body" as applied to a structure?

A. A body is the main portion of something like, for instance—well, using your figure 5, I would say the body is the portion extending between the neck which has the numeral 30, and the bottom of the figure, that would be the body.

107 Q. Now, when you use the word "body" with reference to the structure, it is the main or central portion of the structure, is it not?

A. That is right.

Q. Now, —

A. Depending of course on the figure, to be quite clear here.

Q. Look at Figure 4 of the Smith patent which you have on that chart.

A. That is right.

Q. What would you say was the main or central portion of Smith's structure? This color in red is the whole device?

A. This color in red is the whole device, that is right.

Q. Now, will you break that down to give me the central body portion of that device?

A. The main or central body portion of that device?

Q. With the same hopper?

A. Well, I would say that is generally indicated by the numerals 12′ and 23.

Q. Well now, 12′ is the wall, isn't it?

A. 12′ is the inclined wall, correct.

Q. And 23 is that parallel projection?

A. 23 is the parallel projection, correct.

Q. Is it your position to this Court that the pro-
108 jection constitutes the main or central portion of that hopper?

A. Yes, that extends exteriorally of the bowl as defined by the claim.

Q. You are being slightly technical here. That is the portion of the elbow which extends beyond the feeding bowl, is that what I understand you to say?

A. That is correct.

Q. But the main portion of the hopper does not extend beyond the main feeding bowl, does it?

A. The main portion of the hopper?

Q. The main portion of the hopper?

A. Well now, you have got to define what you mean by main portion.

Q. I asked you to define that, before. I asked you what the body portion of the structure is.

A. Well, you have got to be more specific, you can't talk nebulously, that figure—

Q. What is the body portion of a structure, any structure?

A. Well, again, that is too nebulous, you have got to refer to some particular structure.

The Court: What is the body portion of that structure, let us get to this.

The Witness: Of this structure here?

109 The Court: Yes, that is what we are talking about.

The Witness: It is this inclined wall, your Honor, and this projection here that extends exteriorally of the feeding bowl.

By Mr. Neuman:

Q. You are then referring to one of the walls of that hopper?

A. That is right.

Q. This wall and that little projection?

A. It has this whole wall in it.

Q. About that much—I am indicating now the part which you say is the body portion of that hopper.

A. The specification calls this the whole wall here, right around practically to this.

Q. What specifications are you talking about now?

A. These drawings of the Smith patent in suit, pardon me, the Smith patent 2,207,417.

Q. And Smith calls that his body portion of his hopper?

A. Smith calls that section, the concave side walls that you are talking about now, that I am talking about, as 12′, an inclined wall, the 23 is the projection, this projection down here.

Q. And you say that that part of the wall and that little projection constitutes the body portion of the

110 hopper, that is your position?

A. Yes, that is my position.

Q. And what would you call the balance of the Smith hopper?

A. The chute and the discharge.

Q. What is your understanding of the term "projection"?

A. Projection, a projection is something that extends from a surface.

Q. And from something else, doesn't it, a projection?

A. Anything that extends from one surface, this is a projection, this little bead on the desk here is a projection.

Q. It is a projection though from a bench, isn't it?

A. A projection from this surface, if that is what you are driving at, Mr. Neuman.

Q. Now, you have used the reference, Number 16, under the Smith patent, to describe or indicate the words "a forwardly extending portion," where in the Smith patent do you find any description of that element?

A. The specification of the Smith patent does not allude or I should say does not describe the numeral 16 appearing in Figure 4 of the Smith drawing of that patent.

Q. We don't know that Smith would have said that about No. 16, do you?

111 A. No, it is obvious the forwardly projecting portion.

Q. Isn't that a downwardly projecting portion?

A. It is downwardly and forwardly from the edge of the bowl.

Q. Now, Mr. Snow, I understood you to say that you, in the course of your patent practice, you have written reports for clients on validity and infringement questions.

A. That is correct.

Q. You do a lot of that work, don't you?

A. I do.

Q. We will assume a hypothetical case where one of your clients, a client of Rummler, Rummler & Snow, came to you and said he had a device which you classified as being Smith's, had a hopper and no bowl, and let us assume also that the Nudelman patent is called to your attention, and that there aren't any questions as to the validity of this claim 2 and your client asked you whether he was free to make this hopper and this bowl, in view of Claim 2 of Nudelman's patent, would you tell him that that hopper and bowl constituted an infringement of Claim 2 and that he could not make the hopper and bowl construction?

A. You have to allow me to read this from that interpretation, I did not break this thing down from that

112 point of view, we broke it down from the other point of view.

Now, you are asking me to assume that the Smith claim, if I understand you correctly, that the Smith construction is something that is brought in, to find out whether or not it is an infringement if it was manufactured, with Claim 2

Q. Claim 2, or is an infringement of Claim 2.

A. That is correct.

Mr. Threedy: Your Honor, I cannot see the materiality of that question, whether it is an infringement of Claim 2, we are concerned here with the question of anticipation of the invention.

The Court: Let him answer the question.

The Witness: My opinion would be again, that to

manufacture this, this device, in view of the Smith patent, the client would be liable to be charged with infringement of the claims of the Nudelman patent, by the owners of the Nudelman patent.

By Mr. Neuman:

Q. The owners of the Nudelman patent could stop his making this device?

A. I think so.

The Court: "This device" does not mean anything.

The Witness: Exhibit No. 3.

113 Mr. Neuman: Exhibit 3 and 3-A.

The Witness: We are simply talking of Claim 2.

By Mr. Neuman:

Q. I am talking about Claim 2.

A. That is correct.

Q. Now, looking at that hopper, will you tell that client that that hopper was, using this language and figure, "formed to simulate a living creature"?

A. I would have to tell my client that the hopper as presented to me, although it is not formed to simulate a living creature, it is immaterial from the infringement standpoint because that is merely a functional statement in the claim and does not lend patentability thereto.

Q. Would you tell your client that that hopper device has a simulated mouth in the sense in which Nudelman has described his device in his patent?

A. My answer would be the same as the answer to the previous question.

Q. So you would tell your client that he couldn't make the hopper device of Figure 3—I mean, of Defendant's Exhibits 3 and 3-A?

A. That is correct.

Q. Well, you as a patent attorney, do you agree that it may be contended that the Smith device was not

114 designed to perform Nudelman's function, not whether it is a valid contention or not, but do you agree that such a contention may be made with respect to the Smith device?

A. I am sorry, I lost that. Will you please read the whole question?

(Question read.)

A. I don't understand what you are trying to get at, Mr. Neuman, except maybe I can answer it in this way:

It is my opinion, and I believe it is the opinion of all patent lawyers, that the inventor is never charged with the knowledge of all the uses to which his invention may be put and, consequently, the fact the Nudelman patent discloses one specific form of use of a passageway to return goods from the bowl to a channel or passageway back into the bowl, and he shows it in the shape of a pig and in the Smith patent this is nearly round, they are both still merely figures, in the broad sense of the term, and I don't think it makes a bit of difference whether or not the Smith hopper is formed in the shape of a watermelon, pig, dog or what-not, as long as the functional purpose of the Smith hopper is the same as the claim that you are reading it on, if I am following the thought that you are trying to get across.

Q. I understand your position, that is Mr. Tree-
115 dy's position.

I want to know whether or not a patent attorney and let us take a reasonably prudent patent attorney trying to get Claim 2 allowed over the Smith structure in the Patent Office, do you say that—I am not asking you to agree with me on this, this is your viewpoint, I want to know whether the point can be made and would be made by a reasonably prudent patent attorney, that the Smith device was not designed by Smith for the Nudelman purpose and operation?

A. Well, that argument is made all the time, that one device is built not to be used for the same function, but you don't get anywhere with the Patent Office, they are constantly rejecting claims in the patent application if the structure is what they say, they read the claims exactly as they are presented to them on a particular structure.

Q. I am going to let you talk all you want to talk, I am not too concerned about that, but I want you to answer my question.

A. I am answering your question, Mr. Neuman, but I am sorry I am not following you very well here with your broad questions.

Q. Would such an attorney argue to the Patent
116 Office that it is termed that Smith's avowed object was to put the cream and the cereal from the bowl back into that hopper?

A. Well, you could argue that way, yes.

The Court: We are not getting anywhere, let us get

some questions here that have to do with this law suit, not what some lawyer might argue to the Patent Office.

Mr. Neuman: Your Honor, in my opinion these are all valid objections, against this device.

The Court: You are asking this man what some reasonably prudent lawyer might do in the Patent Office. I don't know how he can figure out what a reasonably prudent lawyer would do down there, how can he know?

Mr. Neuman: He has had to do with the Patent Office.

The Court: Let us get down to some questions that have to do with the law suit. We have spent a couple of hours here without getting anywhere.

By Mr. Neuman:

Q. Is it not contrary to Smith's stated directions to take the cereal from the bottom of the bowl and put it back into the hopper?

A. I wouldn't say it is contrary, I would say that Smith's specification states that the material can flow from the hopper into the bowl and that he doesn't say you 117 are not to take the material from the bowl back into the hopper, there is nothing there that says you can't do it.

Q. I am asking you if it is not contrary to his avowed purpose to use that device that way?

A. I can only tell you what the specification shows and I think I have answered your question, Mr. Neuman.

The Court: Let us take a recess until 2:00 o'clock.

(Thereupon a recess was taken in the above-entitled cause until 2:00 o'clock p. m. of the same day.)

118 Monday, October 24, 1949,
2:00 o'clock p. m.

Court met pursuant to recess.

Parties present: same as before.

WILLIAM A. SNOW, called as a witness in behalf of the Defendants herein, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

Cross-Examination (Continued) by Mr. Neuman.

Q. I want to ask you this, is it not contrary to Smith's express teaching to return the mixed cream or milk and cereal to the hopper portion?

119 A. Yes.

Q. Do you find in the Smith patent any teaching to stimulate and encourage infants to eat by reason of psychology and mimicry?

A. The only answer to that question I read to you before, it is in Column 1, Page 1, of the specification, to arouse the child's interest, and I am referring to Smith's patent 2,207,417, the third paragraph in Column 1, which refers to the use of this device, the Smith device, that it will furnish an interest to the child and cause him to eat.

Q. But that is an interest by the child and not Smith's operation. That is not the idea of mimicry, is it?

A. No, sir, not mimicry.

Mr. Neuman: That is all.

Redirect Examination by Mr. Threedy.

Q. Mr. Snow, in the light of your understanding of the Smith patent No. 2,207,417, is the Smith disclosure limited to the use of a particular food?

A. No, sir, it says, "dry cereal" and "pre-cooked cereals" in the specification.

Q. In your opinion, based on your understanding of the two patents in suit, are either of those claims in

120 suit limited to a particular food?

A. No, sir.

Q. Does the specification of the patent in suit describe a particular type of food to be used with the device?

A. It does not mention any food of any kind or character.

Q. During your examination this morning with respect to the Smith device you pointed out some of the corn flakes would not pass through the passage of the Smith device?

A. Yes.

Q. In your opinion, will the corn flakes pass through the funnel-shaped device of the defendants' device charged here to infringe the patent in suit?

A. It will not.

Q. Is this the one in suit, Mr. Neuman?

Mr. Neuman: Yes, Plaintiff's Exhibit No. 2.

By Mr. Threedy:

Q. I am handing you the defendants' device marked for identification as Plaintiffs' Exhibit No. 2, and also corn flakes and some milk—and I have a blotter here which you might use, and do it very quickly and rapidly so as not to take up any unnecessary time.

A. For the purpose of the record I have placed 121 some corn flakes, the same corn flakes that were used in connection with the demonstration this morning into the bowl of defendants' construction.

I have taken some corn flakes in a spoon with milk and placed it into the mouth of the defendants' pup-like structure and I want to call the Court's attention to the fact that no corn flakes will pass through this passageway (indicating).

The fluid will, the fluid will fall right through but the corn flakes will not.

It is almost impossible, your Honor, to get the corn flakes on the line that passes through that passageway. They all jam right into the passageway and none pass through.

If you will close the head a minute and turn it over, your Honor, you can look into the interior of that passageway and see they will not pass through.

Mr. Threedy: No further redirect examination, if the Court please.

Recross Examination by Mr. Neuman.

Q. Are you distinguishing between pre-cooked foods and dry cereal?

122 A. I am.

Q. Does Smith make that distinction?

A. I believe he does.

Q. Will you read, beginning with Line 12, in Column 1?

A. In Column 1, Line 12, Smith says:

"Cereals that are pre-cooked, or otherwise prepared for eating in a dry state, are usually in the form of granules, flakes or other particles that are readily fed by gravity from a hopper. Such cereals are more palatable and are also more readily digested, if the same are not soaked in the liquid before being eaten."

I see your point, just a minute.

You are right, counsel. I am wrong in making the statement that Smith refers to a pre-cooked cereal as one being listed and not in a dry state.

The Smith patent specification does not particularly call for it, it says a pre-cooked is a dry cereal.

Q. Just one more question, Mr. Snow, it is the purpose of Smith to maintain these dry cereals in a crisp form instead of having them soggy, so, as he said, it will

123 be chewed more thoroughly by the eater?

A. That is as I read in the previous answer.

Q. And for that purpose he has divided his bowl into two compartments, one to maintain the cereal in a dry state and the other in which to place the cream or milk?

A. The answer to your question is yes, as we demonstrated here. Dry cereals will not flow downward into the bowl but have to be forced down.

Mr. Neuman: That is all.

Mr. Threedy: Just one question, it is not properly redirect, Your Honor, but I would like to ask the Court's permission to ask it.

The Court: All right.

By Mr. Threedy:

Q. Do either of the two claims of the patent in suit limit the size of the passage of the funnel-shape either in length or diameter?

A. No, they do not.

Mr. Threedy: That is all.

Mr. Neuman: That is all.

(Witness excused.)

Mr. Threedy: I would like to ask the reporter to mark Patent No. 2,206,960, and Patent No. 2,224,683 as Defendants' Exhibit 6 and 7, respectively.

124 The Court: All right.

Mr. Threedy: If the Court please, these patents were not set up in the defendants' answer or in the petition for declaratory judgment or in the answer to plaintiffs' complaint, but I offer these two patents in evidence as Defendants' Exhibits 6 and 7 for the purpose of showing that other devices have been accomplished which are used for the purpose of interesting a child in eating cereals and like foods.

Unfortunately I do not have copies of the patents for counsel but if he desires I will get him photostats.

Mr. Neuman: May we look at them for a moment, your Honor?

The Court: Yes.

Mr. Neuman: We have no objection to the patents.

The Court: They may be admitted.

(Which said documents were marked DEFENDANTS' EXHIBITS 6 and 7, respectively, for identification and were thereupon received in evidence.)

125 Mr. Threedy: The defendant rests.

Mr. Neuman: I have no rebuttal, your Honor.

The Court: Very well.

(Which was all of the evidence offered or received on behalf of either of the parties in the above-entitled matter.)

126 The Court: There is not much difference between this chart that you are using and his chart, No. 2, that they produced or their Exhibit No. 2.

Mr. Neuman: Their Chart No. 2 shows that one of 127 the figures from our patent—

The Court: You have followed the same procedure and have taken their patent and have taken it apart.

Mr. Neuman: No, I am taking our claim and showing how our claims lays itself on their device, which is the accused device.

The Court: It is a comparison.

Mr. Neuman: Yes.

The Court: That is pretty much like their Exhibit No. 2.

Mr. Neuman: Except they are not showing what we are trying to show.

The Court: I understand, they are making a comparison, so, having let their Exhibit No. 2 go in, I see no reason why this should not go in.

Have it marked as an exhibit and let it go in.

Mr. Neuman: What is our next exhibit number?

Mr. Kraus: I think fifteen.

Mr. Neuman: We can do that later, I think it will be our Plaintiffs' Exhibit No. 15.

The Court: All right. Go ahead.

128 (Which said chart, was marked PLAINTIFFS' EXHIBIT NO. 15 for identification and was thereupon received in evidence.)

129 Now I have tried to cover the high spots in my argument and just as a matter of a light review of what my worthy opponent has pointed out as their claim of invention, I would like to review some of those statements. For example he says that invention involves novelty and utility. I take no issue with that, but we should add to that that it must also amount to invention.

The fact that the invention is new and the fact that it is useful does not in itself make it patentable; we don't patent ideas; we patent the mechanism or the means by which we carry out the thing we seek to accomplish; it is the structure that we patent. If that structure is shown in the prior art then that structure is not a patentable feature and whether it has novelty or utility is of no point.

130 Now, Mr. Threedy talked about his design patent decision and your Honor, I don't think such decisions have anything to do with design patents or are relevant in this case.

Of course, if we had taken out a design patent on the shape of the pig, such a patent would be invalid, but where we have the shape of a pig or the shape of an animal as being of the essence of this invention, it is very essential, in order to carry out Nudelman's concept, that you have a figure simulating a living creature, a living animal, so that you may put food into its jaws, which has the psychology of mimicry, which this device has and which makes this device a very useful device, and that is why I objected to Mr. Snow striking from Claim 2 the simulation of an animal, simulating the figure of an animal because that is very essential to this invention and that is something which you find in the puppy device.

HUNGRY PIGGY A UTILITY-TOY WHICH SOLVES THE FEEDING PROBLEM

HUNGRY PIGGY is a radically new conception in the baby field which provides a definite solution to the ever present feeding problem. Combining the practicality of a utility and the appeal of a toy, Piggy encourages baby to imitate Piggy's happy, healthy appetite. HUNGRY PIGGY clamps over the edge of the bowl, opening his mouth wide when a spoonful of food is inserted. He gives the appearance of actually swallowing with unflagging enthusiasm. However, he is so constructed that the food returns right back into the bowl and baby isn't denied a single morsel. Piggy comes in a pleasant tone of pink Lustrex—a plastic that withstands hot water without distortion or change in color. He is accompanied by a companion 'Piggy Bowl' comprising a two piece set with the further addition of a novel spoon, fork and stand in a five piece ensemble. Accessories are in complementary colors of heat-resisting Lustrex. Based on the psychological mechanism of mimicry ("One for the baby and one for piggy") HUNGRY PIGGY easily persuades baby to eat where all of mother's commands and wiles may fail.

132 PLAINTIFFS' EXHIBIT NO. 6.

(Filed Jan. 30, 1950. Roy H. Johnson, Clerk.)

(Letterhead of Topic Toys—Chicago, Illinois.)

Hungry Piggy Sales.

Date	Amount
September 1948	742
October	14,458
November	28,586
December	20,256
January 1949	8,862
February	16,686
March	21,360
April	17,488
May	15,092
June	13,776
July	11,916
August	10,954
September	11,210
Total	191,386

NEVER HAS A UTILITY-TOY BEEN MADE TO ANSWER SUCH A DEFINITELY IMPORTANT NEED.

Hungry Piggy solves a Mother's feeding problems. The clever little plastic piggy clamps right over the bowl. His mouth opens wide when a spoonful of food is inserted. Hungry Piggy gives the appearance of *actually swallowing*. However his body is so constructed that the food *returns right back into the bowl* and baby gets his full portion. With his healthy, happy appetite Hungry Piggy encourages the child to follow by example, right down to the last mouthful.

The bottom of the accompanying bowl contains an engraving of a well fed little piggy and the words "All Gone."

Hungry Piggy is in pastel pink, bowl in harmonizing blue. Both made of Lumex—withstands hot water without distortion in form or change in color.

RETAIL PRICE

$1.00

Two piece set packed in display box as illustrated. Three dozen to shipping container. Immediate delivery. Shipping weight, 60 lbs.

F. O. B. CHICAGO, ILLINOIS

STANDARD TRADE DISCOUNTS

RETAIL PRICE $1.39

STANDARD TRADE DISCOUNTS

F. O. B. CHICAGO, ILL.

The addition of an original, plastic spoon and fork set with Hungry Piggy and Bowl makes an appealing gift value in the baby field.

Heads of spoon and fork are laughing bunnies. Bodies are part of stand.

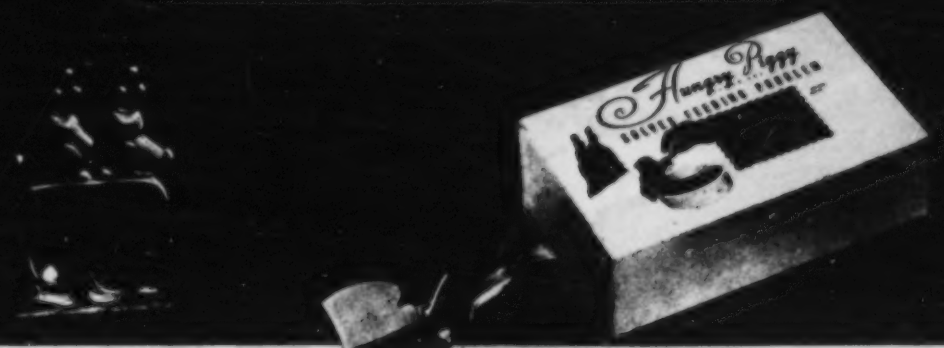
When spoon and fork are not in use, they are snapped into stands which form body of bunnies. Spoon and fork and stand in contrasting colors of pink and blue. Made of Lumex—withstands hot water.

"HUNGRY PIGGY" AVAILABLE AS A 5-PIECE SET IN A BEAUTIFUL DISPLAY BOX

The addition of an original, plastic spoon and fork set with Hungry Piggy and Bowl makes an outstanding gift value in the baby field.

Heads of spoon and fork are laughing bunnies. Bodies are part of stand.

When spoon and fork are not in use, they are snapped into stands which form body of bunnies. Spoon and fork and stand in contrasting colors of pink and blue. Made of Lustrex —withstands hot water.



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Hungry Piggy solves a Mother's feeding problems. The clever little plastic piggy clamps right over the bowl. His mouth opens wide when a spoonful of food is inserted. Hungry Piggy gives the appearance of *actually swallowing*. However his body is so constructed that the food *returns right back into the bowl* and baby gets his full portion. With his healthy, happy appetite Hungry Piggy encourages the child to follow by example, right down to the last mouthful.

The bottom of the accompanying bowl contains an engraving of a well fed little piggy and the words "All Gone."

Hungry Piggy is in pastel pink, bowl in harmonizing blue. Both made of Lustrex—withstands hot water without distortion in form or change in color.

Beautiful gift box in pastel pink and blue has a truly quality appearance. A perfect gift. Five pieces set as illustrated in gift box packed 2 dozen to shipping container. Weight, 22 lbs.

RETAIL PRICE $1.00

STANDARD TRADE DISCOUNTS

F. O. B. CHICAGO, ILL.

FILED

JAN 30 1950

AT ..... O'CLOCK .....

ROY B. JOHNSON

CLERK

12-4

Sensational!

The Answer to Mothers' Feeding Problems

- ★ The Perfect Utility
- ★ A Fascinating Toy
- ★ A Splendid Gift
- ★ A Sales Natural!

PIGGY: 3½" HIGH
2½" WIDE

BOWL: 1¾" HIGH
5" IN DIAMETER

RETAIL PRICE

Two piece set packed in display box as illustrated. Two dozen to shipping container. Immediate delivery. Shipping weight, 15 lbs.

79c

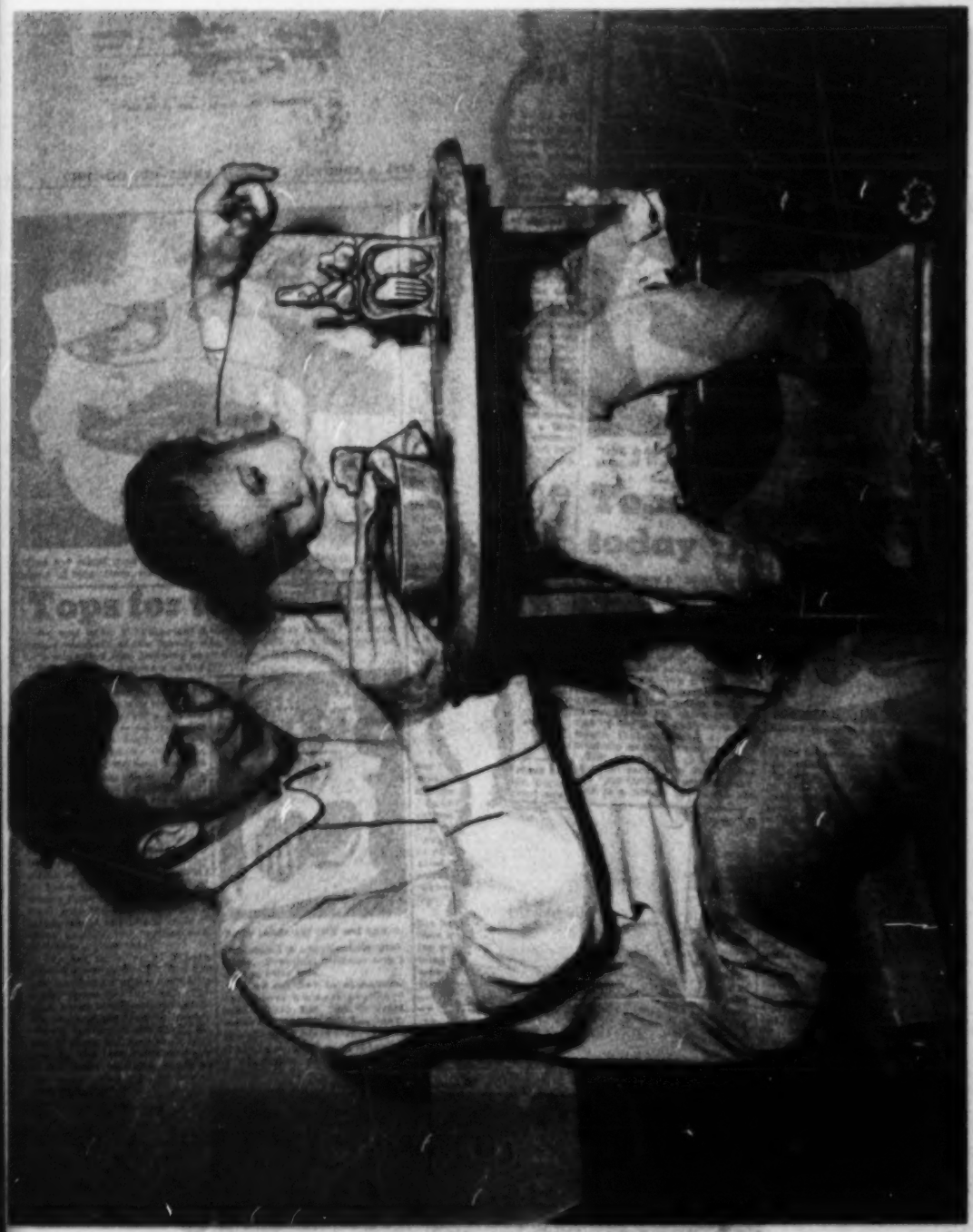
F.O.B. CHICAGO, ILLINOIS

STANDARD TRADE DISCOUNTS

YORK TOYS

NEW! CLEVER!
HUNGRY PIGGY
BABY DISH
and
A tricky little feeding dish that makes a game of baby's meal time
6 CANS OF YOUR FAVORITE BRAND OF BABY FOOD
PIGGY REALLY EATS!
ALL FOR ONLY
$1.19

PLAINTIFFS' EXHIBIT NO. 10.



PLAINTIFFS' EXHIBIT NO. 11.

74

4928

"One for piggy, and one for baby." Tricky little device makes some of meal time, overcomes problem tot's reluctance to eat.

Tops for today

By Janet Windsor

Do you have a "reluctant Robert" in your home? A very junior member of the family who just won't eat a thing unless he's wheedled into downing each bite?

If every meal involves a battle with baby, you'll be glad to hear there's a new device on the market that should actually end these tiring sessions. It's a very clever plastic bowl with small pink piggy attachment that makes eating a game. Mister Pig hooks onto the side of the bowl and has a wide mouth that can take as big a mouthful as your little rascal.

The whole idea of the set is based on baby's love for mimicry. The "one for piggy, one for baby" trick is a simple but sound one. If the tot sees the little porky eating without complaint, he will do the same. What he doesn't know is that the food slides right through the pig and back into the bowl. Psychiatrists might say it's a "mean" trick to play, but mother will feel it's a good idea.

Bunny heads top fork and spoon, are colored in a harmonizing pink shade. Practical mothers won't want to miss this.

The set sells for $1 if purchased alone or for $1.39 if you are interested in the matching bunny spoon and fork set. The pink stand has bunny bodies at the top and the feeding implements fasten on the back, the top of them forming the bunny heads. The fork and spoon are in the same soft blue shade as the bowl. The pig and holder are colored in a harmonizing pink shade. Practical mothers won't want to miss this.

(For further information, call Janet Windsor at DEarborn 2-2330, Ext. 782, or write her at the SUN-TIMES, Box 1180, Merchandise Mart Post Office, Chicago, 54, Ill., inclosing a stamped, self-addressed envelope.)

Women's sphere

"ONE for piggy, and one for baby." Tricky little device makes some of meal time, overcomes problem tot's reluctance to eat.

Tops for today

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Bunny heads top fork and spoon

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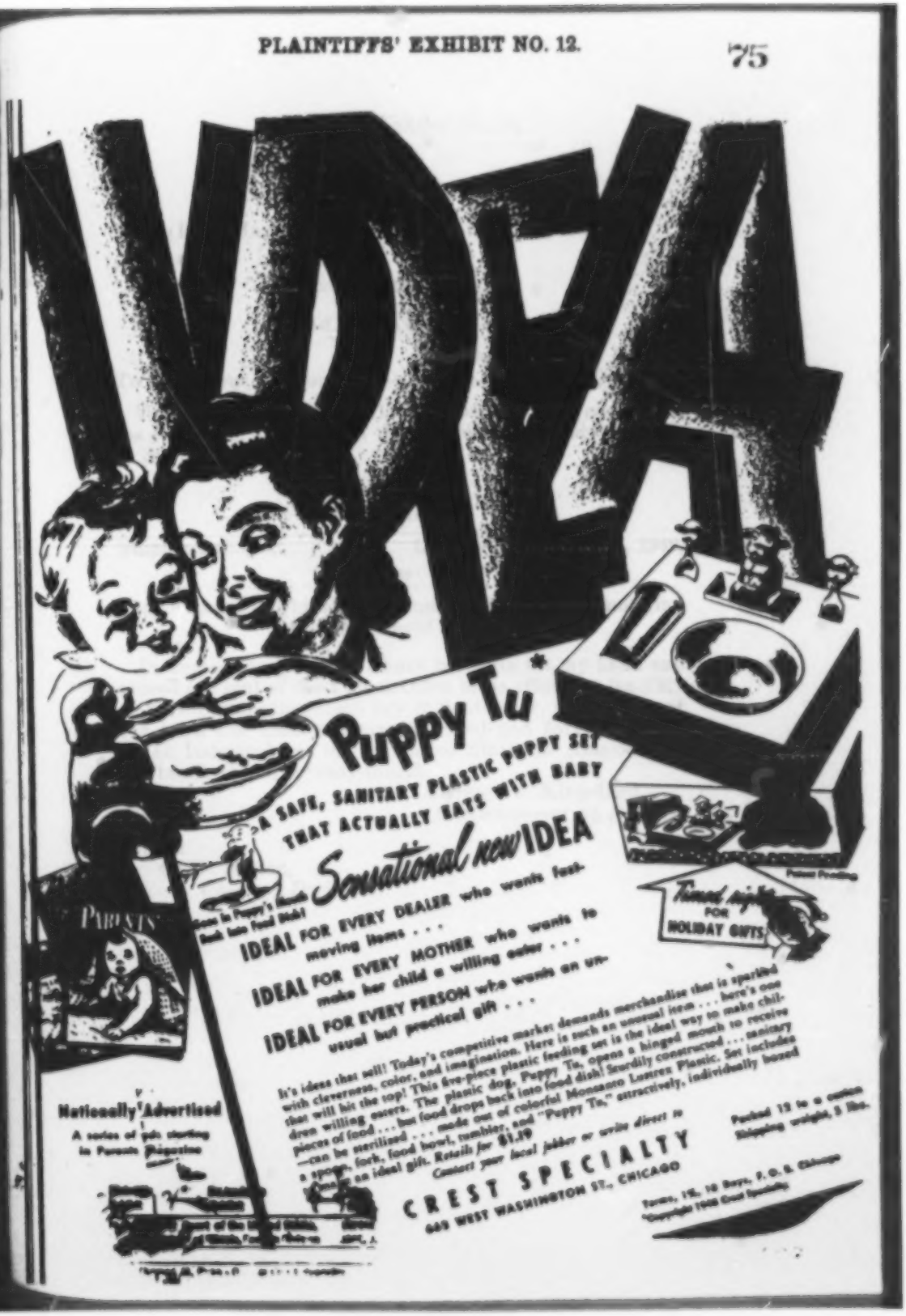
IDEA
Puppy Tu*
A SAFE, SANITARY PLASTIC PUPPY SET
THAT ACTUALLY EATS WITH BABY
Sensational new IDEA
IDEAL FOR EVERY DEALER who wants fast-moving items . . .
IDEAL FOR EVERY MOTHER who wants to make her child a willing eater . . .
IDEAL FOR EVERY PERSON who wants an unusual but practical gift . . .
It's ideas that sell! Today's competitive market demands merchandise that is sparkled with cleverness, color, and imagination. Here is such an unusual item . . . here's one that will hit the top! This five-piece plastic feeding set is the ideal way to make children willing eaters. The plastic dog, Puppy Tu, opens a hinged mouth to receive pieces of food . . . but food drops back into food dish! Sturdily constructed . . . sanitary —can be sterilized . . . made out of colorful Monsanto Lustrex Plastic. Set includes a spoon, fork, food bowl, tumbler, and "Puppy Tu," attractively, individually boxed as an ideal gift. Retails for $1.19
Contact your local jobber or write direct to
CREST SPECIALTY
643 WEST WASHINGTON ST., CHICAGO
Packed 12 to a carton
Shipping weight, 5 lbs.
Terms, 1%, 10 Days, F. O. B. Chicago
*Copyright 1948 Crest Specialty
Nationally Advertised
A series of ads starting in Parents Magazine
PARENTS
Flower Printing
Timed right FOR HOLIDAY GIFTS

139 PLAINTIFFS' EXHIBIT NO. 14.

(Filed Jan. 30, 1950 Roy H. Johnson, Clerk.)

DEPARTMENT OF COMMERCE

United States Patent Office

To all persons to whom these presents shall come, Greeting:

This Is To Certify that the annexed is a true copy from the records of this office of the File Wrapper and Contents, in the matter of the

Letters Patent of
Ben B. Manaster,

Number 2,453,922, Granted November 16, 1948,

for

Improvement in Child's Combination Appetite-Stimulating and Amusement Devices.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this ninth day of September, in the year of our Lord one thousand nine hundred and forty-nine and of the Independence of the United States of America the one hundred and seventy-fourth.

Lawrence C. Kingsland,
Commissioner of Patents.

(Seal)

Attest:
C. W. Sutton,
Chief of Division.

140 3939

Number (Series of 1948)

36773

Patent No. 2453922
Dated Nov. 16, 1948
(Ex'r's Book) 69-37

Div. 57

Name Ben B. Manaster,
of Chicago,
State of Illinois.

Invention Child's Combination Appetite-Stimulating and Amusement Devices.

Original

Application Filed Complete July 2, 1948

Parts of Application Filed

Petition, Specification, Oath, First Fee $30 } July 2, 1948
1 sheet Drawings, }

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Examined and passed for Issue Sept. 15, 1948 Arthur B. Miller, Exr. Div. 57
Notice of Allowance Oct. 15, 1948

By Commissioner.

Final Fee $30 Oct. 18/48
Attorney Clarence E. Threedy, 111 West Washington St., Chicago 2, Ill.
Associate Attorney .....
No. of Claim Allowed (per K. R.) 4 Print Claims 1 in O. G. Class 46-141
Title as allowed Child's Combination Appetite-Stimulating and Amusement Devices

(In left-hand margin) Division of App., No. ....., filed ....., 19.....

141 (Letterhead of Clarence E. Threedy, Chicago.)

(Stamp) Mail Division Jul-2 1948 U. S. Patent Office.

30.00
July 1, 1948

Commissioner of Patents
Washington 25, D. C.

Sir:

Re: Patent Application of
Ben B. Manaster
On Child's Combination
Appetite-Stimulating and
Amusement Device.
(Case No. 3939)

In am enclosing herewith for filing the above application, including one sheet of drawing.

The filing fee of $30.00 is covered by the accompanying certified check.

Respectfully submitted,
Clarence E. Threedy.

CET:BS
Enc.

1 36773

142 2799
1/51 36773

(Stamps) Mail Division Jul 2 1948 U. S. Patent Office.
U. S. Patent Office Received Jul 14 1948 Div. 57

922

This invention relates to Child's Combination Appetite-Stimulating and Amusement Devices.

An object of the invention is to provide a character simulating an animal such, for example, *(AS) a dog in a sitting position, adjacent a dish or bowl to stimulate a child's interest in eating by arranging the head of the character in a posture which presents an appeal for something to eat, and which head is capable

* Matter in parentheses inserted.

of vibratory or oscillating action by virtue of contact
with a feeding spoon, whereby to simulate feeding action.

—1— 36773

143 2800

It is the intent that this character thus arranged adjacent
the dish or bowl will have the effect of inducing the child
to alternately feed itself and the character, thus stimulating
the child to consume its food.

Other objects will appear hereinafter

The invention consists in the novel combination and
arrangement of parts to be hereinafter described and claimed.

The invention will be best understood by reference
to the accompanying drawings showing the preferred form of
construction, and in which:

Fig. 1 is a perspective view of the invention showing the same in sitting position with respect to a
bowl or dish;

Fig. 2 is a side elevational view of the same;

Fig. 3 is a vertical sectional detail view of the same.

—2— 36773

144 2801

To accomplish the several objects of my invention,
I provide a character 10 which, in the present instance, is
formed in the shape of a dog in sitting position upon its
hind legs 11. The front legs or paws 12 of the dog are
arranged with respect to the body 13 thereof so as to provide

an undercut 14. The paws 12 slightly depend into the dish
16 so that the dish and the body 13 cannot be easily moved
apart.

Formed through the body 13 is a channel or passage 15. The undercut 14 is of such depth as permits
the bowl or dish 16 to be positioned with respect to the
body 13 with the edge portion 17 disposed within the
undercut 14 beneath the paws 12, with the channel 15
communicating with the interior of the bowl 16. By reason of the character of the wall 18 of the cut-out
portion, bowls of various heights may be used, such as
indicated at 19. This follows from the fact that the curved wall 18 permits the positioning of bowls of various heights within the undercut, with the interior
of the bowl communicating with the channel 15 so that
food or liquid passing through the channel 15 will move
or flow into the bowl without spilling therefrom.

—3— 36773

145 2802

The head 20 of the dog is normally supported
in spaced relation with respect to the neck portion 21
thereof with the portion 22 of the head slightly over-
lapping the nape 23 of the neck, whereby the overlapping
portion 22 of the head 20 will contact the nape of the
neck to limit the movement of the head 20 upwardly.

The head 20 is supported for vibratory or

oscillatory movement upon the body 10 by means of a
shaft 24, one end of which is fixedly embedded in the
head 20 as at 25 and the opposite end 26 of which is removably
projected in an opening 27 formed in the body 13.

Portions of the head and body are removed to provide clearance between the head and body and the
shaft 24 as at 28. This clearance permits the head to
vibrate or oscillate vigorously when contacted by the
end of a spoon 29.

As before stated, the object of this invention is two-fold: First, to provide amusement for a child
during eating, and, second, to stimulate eating of the
food by the child. This may result from the fact that
the child is instructed or suggested to give spoonfuls
of food alternately to itself and the dog or other character.

—4— 36773

146 2803

The head of the dog normally is positioned with
H. S. respect to the body ~~such~~ *(SO) that the jaws 30 and ~~30'~~ *(31) of the
dog are in partially open, or "begging", position, being
spaced apart a sufficient distance to permit initial insertion of the end of the spoon between the jaws 30 and
H. S. ~~30'~~ *(31). As the child attempts to discharge the food from
per A the spoon into the mouth of the dog, the head 20 *(BY PRESSURE OF THE SPOON 29 AGAINST THE JAW 30) will be
" " ~~moved~~ *(TILTED) rearwardly *(AGAINST

*Matter in parentheses inserted.

THE ACTION OF THE SHAFT 24). When ~~the~~ *(THIS PRESSURE OF THE) spoon is removed from ~~contact~~

" " } *(JAW 30) ~~with the head,~~ the shaft 24, being of
" B } resilient material,
will cause the head to vigorously vibrate or oscillate to

" B ~~stimulate~~ *(SIMULATE) eating action by the dog. Food deposited in the

H. S. mouth of the dog between the paws 30 and ~~30'~~ *(31) will be guided.

H. S. to the channel 15 by the jaw 30', which is concave transversely to provide a groove 31' leading to the channel 15,
and such food will pass through the channel 15 back into
the bowl 16. To a great extent, the overlapping portion
22 of the head will serve to prevent food from passing
rearwardly out between the head of the dog and the body
thereof.

While I have illustrated the character in the form of a dog, it is manifest that the character may take
other forms of animals.

Inasmuch as the shaft 24 is fixedly secured to the head 20, the head may be removed by withdrawing the end
26 of the shaft from the opening 27 for cleansing purposes.

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147 2804

It will be noted that the relative position between the jaws of the head 20 and the dish 16 is such
that the jaws project over the rim of the bowl or dish

* Matter in parentheses inserted.

so that any food spilled during the feeding of the dog
or other character, will fall back into the bowl 16.

While I have illustrated and described the preferred form of construction for carrying my invention
into effect, this is capable of variation and modification
without departing from the spirit of the invention. I,
therefore, do not wish to be limited to the precise details
of construction set forth, but desire to avail myself of
such variations and modifications as come within the scope
of the appended claims.

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148 2805

Having thus described my invention, what I claim as new and desire to protect by Letters Patent
is:

1. A child's combination appetite-stimulating and amusement device comprising a body having an undercut
portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined
downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw
portion providing a rest for the end of a spoon delivering
material to said channel, a head for said body and arranged
over said channel and having a jaw portion in spaced
confronting relation with respect to the jaw portion

of said body and adapted to be engaged by the end of
said spoon and tilted relative to said body by said spoon, and means connecting the head to the body for
oscillatory movement with respect to the body when said
spoon is moved from engagement with respect to said head.

7 36773

149 2806

2. A child's combination appetite-stimulating and amusement device comprising a body having an undercut
portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw
portion providing a rest for the end of a spoon delivering material to said channel, a head for said body and
arranged over said channel and having a jaw portion in
spaced confronting relation with respect to the jaw portion of said body and adapted to be engaged by the
end of said spoon and tilted relative to said body by
said spoon, and means connecting the head to the body
for oscillatory movement with respect to the body when
said spoon is moved from engagement with respect to said
head, said means including a flexible shaft fixedly secured to the head and removably inserted in an opening
formed in the body.

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150 2807

3. A child's combination appetite-stimulating and amusement device comprising a body having an undercut portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw portion providing a rest for the end of a spoon delivering material to said channel, a head for said body and arranged over said channel and having a jaw portion in spaced confronting relation with respect to the jaw portion of said body and adapted to be engaged by the end of said spoon and tilted relative to said body by said spoon, and means connecting the head to the body for oscillatory movement with respect to the body when said spoon is moved from engagement with respect to said head, said head having a portion opposite the jaw portion thereof disposed in overlapping relation with respect to an adjacent portion of said body.

9 36773

151 2808

4. A child's combination appetite-stimulating and amusement device comprising a character simulating a dog in sitting position upon its hind legs with its front legs projecting forwardly over a cut-out portion provided

in the body for the reception of the edge portion of a
dish, with the ends of the front legs projecting over
the rim of the dish, said body having an inclined down-
wardly extending channel formed therein for com-
munication
with said dish and said body being provided with a jaw
portion providing a rest for the end of a spoon, a head
for said body providing a jaw portion in con-
fronting
relation with respect to the jaw of said body and adapted
for engagement with said spoon, a flexible shaft connecting
the head to the body, said head being adapted to be tilted
upwardly and away from said body by said spoon and when
said spoon is disengaged from said head, said flexible
shaft serving to oscillate said head to simulate eating
action.

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152 2810

Sole

OATH, POWER OF ATTORNEY, AND PETITION.

Being duly sworn, I, Ben B. Manaster, depose and say that I am a citizen of The United States of America, residing at 663 West Washington Street, Chicago, Illinois; that I have read the foregoing specification and claims and I verily believe I am the original, first, and sole inventor of the invention or discovery in

Child's Combination Appetite-Stimulating and Amusement Devices

described and claimed therein; that I do not know and do not believe that this invention was ever known or used before my invention or discovery thereof, or patented or described in any printed publication in any country before my invention or discovery thereof, or more than one year prior to this application, or in public use or on sale in the United States for more than one year prior to this application; that this invention or discovery has not been patented in any country foreign to the United States on an application filed by me or my legal representatives or assigns more than twelve months before this application; and that no application for patent on this invention or discovery has been filed by me or my representatives or assigns in any country foreign to the United States, except as follows:

And I hereby appoint Clarence E. Threedy, 111 West Washington Street, Chicago 2, Illinois, Registration No. 11,702, my attorney or agent with full power of substitution and revocation, to prosecute this application and to transact all business in the Patent Office connected therewith.

Wherefore I pray that Letters Patent be granted to me for the invention or discovery described and claimed in the foregoing specification and claims, and I hereby subscribe my name to the foregoing specification and claims, oath, power of attorney, and this petition, this 24th day of June, 1948.

Inventor:
Ben B. Manaster,
Post Office Address:
663 West Washington Street,
Chicago, Illinois.

State of Illinois. }
County of Cook. } ss.

Before me personally appeared Ben B. Manaster, to me known to be the person described in the above application for patent, who signed the foregoing instrument in my presence, and made oath before me to the allegations set forth therein as being under oath, on the date and year aforesaid.

Katherine A. Yergy,
(Seal) *Notary Public.*

This form may be executed only when attached to a complete application as the last page thereof.

Approved Single Signature Form
Sole Inventor.

939

11 36773

153 Patent drawing, Patent No. 2,453,922—see index.

154 (Stamps) Mail Division Sep-1 1948 U. S. Patent Office. U. S. Patent Office Received Sep-9 1948 Div. 57.

Serial No. 36,773 Paper No. 3

Petition to Commr. to make "Special".
Mr. Moore

IN THE UNITED STATES PATENT OFFICE

Division 57

In re Application of
Ben B. Manaster
Serial No. 36,773
Filed July 2, 1948

For: Child's Combination Appetite-Stimulating and Amusement Device

To the Hon. Commissioner of Patents:

PETITION TO MAKE SPECIAL.

Your petitioner, Crest Specialty (Not Inc.), a copartnership having its principal place of business at Chicago, Illinois, by its attorney, Clarence E. Threedy, represents that it has the exclusive license and right to manufacture, vend and sell the invention described and claimed in the above-entitled application, by an instrument in writing from the inventor, Ben B. Manaster; that petitioner is desirous of manufacturing and selling the device of said application; that it has produced samples of said device, submitted the same to the trade, and has determined thereby that there is a substantial market for the said device; that petitioner, who has a Dun & Bradstreet rating of $75,000-$125,000, is financially able, and has adequate manufacturing facilities in the nature of its own plant employing 78 persons to manufacture said device, and is otherwise ready and willing to proceed with the manufacture and sale of said device provided the necessary investment for tools, dies, jigs, injection molds, advertising and other expenditures preliminary and necessary to said manufacture and sale can be afforded the protection of Letters Patent on

155 said device in accordance with the claims of said application; that the allowance and patenting of the claims of said application will be adequate inducement for petitioner to proceed with the manufacture and sale of said device and make said investment; that petitioner will, upon the request of the Commissioner of Patents, report under oath of a member of the petitioner partnership as to the number of said devices manufactured and sold, as well as the extent to which employment of labor was increased and the amount of money expended in said manufacture, within three months after the allowance of a claim on the invention of said application (or reversion of the application to ordinary status).

Wherefore, your petitioner prays that the said application may be made special in accordance with the rules and laws provided and had in such cases, and your petitioner submits in support of this petition the affidavit of a member of the petitioner partnership, and of its patent attorney, showing in fact that petitioner is ready, willing and able to proceed with the manufacture and sale of said device, the expenditure of the necessary monies in so doing, and that the public will benefit by such manufacture as a result of said expenditures as well as increased employment in said manufacture and sale and the commerce in the sale of said device, and also that the claims of said application are allowable over the prior art, and your petitioner ever prays.

Crest Specialty (Not Inc.),
By Sol Eliot,
A Member.

Clarence E. Threedy,
Attorney for Petitioner.

Chicago, Illinois.

—2—

156 (Stamps) Mail Division Sep-1 1948 U. S. Patent Office. U. S. Patent Office Received Sep-9 1948 Div. 57.

IN THE UNITED STATES PATENT OFFICE

Division 57.

In re application of
Ben B. Manaster
Serial No. 36,773
Filed July 2, 1948

For: Child's Combination Appetite-Stimulating and Amusement Device

Hon. Commissioner of Patents:

AFFIDAVIT OF SOL ELIOT IN SUPPORT OF PETITION TO MAKE SPECIAL.

State of Illinois, } ss.
County of Cook. }

I, Sol Eliot, being duly sworn, according to the law, depose and say that I am of lawful age and a citizen of the United States and a resident of Chicago, Illinois, and a member of Crest Specialty (Not Inc.), a copartnership, named in the petition hereto attached; that said petitioner, Crest Specialty (Not Inc.), has the exclusive license and right to manufacture, vend and sell the invention described and claimed in the above-entitled application, by an instrument in writing from the inventor, Ben B. Manaster; that said petitioner is ready, willing and able to manufacture and sell the device of said application; that said petitioner has produced samples of said device, submitted the same to the trade, and determined thereby that there is a market for the said device and that said device can be sold, distributed and otherwise put into commerce in large numbers, to-wit, ninety thousand (90,000) per month; that in order for peti-

157 tioner to manufacture and sell said devices, it will be obliged to expend a large sum of money, to-wit, about Twenty Thousand Dollars ($20,000) for the necessary in-

jection molds, and other tools, dies, jigs, and the like, and Thirty-five Thousand Dollars ($35,000) in advertising, making a total of at least Fifty-five Thousand Dollars ($55,000) as an initial investment and expenditure in marketing said device; that I know and represent the fact to be that said petitioner is solvent and has assets including tangibles, accounts receivable, and funds on deposit far in excess of the proposed investment and wholly adequate to undertake the manufacture and sale of the device of said application in accordance with the representations of said petition and this affidavit; that said petitioner has manufacturing facilities including its own plant employing seventy-eight (78) persons, for the manufacture of said device; that the petitioner is ready to undertake the expenditure of said sum for the manufacture of said device, provided, however, that the same is first protected by Letters Patent or allowance of a claim or claims in accordance with said application; that about thirty-two (32) persons will be given employment if and when said manufacture and sale is undertaken; that by authorization of the members of the copartnership, petitioner herein, I obligate petitioner to manufacture said device in quantity immediately upon the allowance of a claim or claims which will protect the investment; that I have been informed by Clarence E. Threedy, the attorney of record in said application and patent attorney for the petitioner, that he believes the claims of said application define patentability and that said application should be in condition for allowance when acted upon; that said petition is well founded and the facts

—2—

16 36773

158 therein true and correct to the best of my knowledge and belief.

Further affiant sayeth not.

Sol Eliot.

Subscribed and sworn to before me this 2nd day of August, 1948.

Katherine A. Yergy,
Notary Public.

(Seal)

—3—

17 36773

159 (Stamps) Mail Division Sep-1 1948 U. S. Patent Office. U. S. Patent Office Received Sep-9 1948 Div. 57.

IN THE UNITED STATES PATENT OFFICE

Division 57

In re Application of
Ben B. Manaster
Serial No. 36,773
Filed July 2, 1948

For: Child's Combination Appetite-Stimulating and Amusement Device

To the Hon. Commissioner of Patents:

AFFIDAVIT OF CLARENCE E. THREEDY IN SUPPORT OF PETITION TO MAKE SPECIAL

State of Illinois, } ss.
County of Cook. }

I, Clarence E. Threedy, being duly sworn, according to law, depose and say that I am of lawful age, a citizen of the United States of America, and a resident of Chicago, Illinois; that I am the attorney of record in the above-entitled application and attorney for Crest Specialty (Not Inc.), petitioner herein; that said petitioner has the exclusive license and right to manufacture, vend and sell the invention described and claimed in the above-entitled application; that I know the contents of the annexed petition to make special and the contents of the affidavit of Sol Eliot in support of said petition, and that the factual representations therein are to the best of my knowledge and belief true and correct; that I am familiar with the art to which said application and the invention thereof appertains and have caused to be made a careful and thorough search of said art to determine the patentability of the claims of said application and that as a result of said search I believe that

160 said claims define patentability over the prior art and that said application should be in condition for allowance upon examination; that I believe and assert the fact

to be that the petitioner is financially responsible; that it has adequate funds and manufacturing facilities to undertake the manufacture and sale of said device, and that the petitioner is ready to undertake the manufacture and sale of said device provided a claim or claims of said application are first allowed or patented; and it is my opinion that the public will benefit by the expenditure of monies necessary to the manufacturing and sale of said device and the resulting commerce in said device as well as the increased employment of labor in the manufacture of said device, and that therefore said petition is well founded.

Further affiant sayeth not.

Clarence E. Threedy.

Subscribed and sworn to before me this 27th day of August, 1948.

Katherine A. Yergy,
Notary Public.

(Seal)

161 (Stamp) U. S. Patent Office Commissioner's Office B Sep 9 1948 Copy mailed.

Serial No. 36,773 Paper No. 4
Pet. to Commr. to make "Special" granted.

Address Only
The Commissioner of Patents
Washington, D. C.

DEPARTMENT OF COMMERCE
United States Patent Office
Washington

September 9, 1948

Ex parte Ben B. Manaster
Serial No. 36,773
Filed July 2, 1948
Child's Combination Appetite-Stimulating and Amusement Devices.
} Petition to Make Special

The petition to make this case special has been considered.

If the examiner can make this case special without prejudice to any possible interfering application, he is authorized to do so for the first action. Should the application be rejected, the case will not be considered special for the subsequent action unless the applicant promptly makes a bona fide effort to place the case in condition for allowance even if it is necessary to have an interview with the examiner to accomplish this purpose.

The petition is granted to the extent indicated.

Thomas F. Murphy,
Assistant Commissioner.

Clarence E. Threedy
111 West Washington Street
Chicago 2, Illinois

162 Room 5886 sh/wv Paper No. 5

Address only The Commissioner of Patents, Washington 25, D. C.

All communications respecting this application should give the serial number, date of filing, and name of the applicant.

DEPARTMENT OF COMMERCE

United States Patent Office

Washington

Please find below a communication from the Examiner in charge of this application.

Lawrence C. Kingsland,
Commissioner of Patents.

(Stamp) U. S. Patent Office Sept 13 1948 Mailed.

Division: 57
Applicant: Ben B. Manaster
Ser. No. 36773
Filed July 2, 1948
For Child's Combination
Appetite-Stimulating
And Amusement Devices

Clarence E. Threedy
111 West Washington Street
Chicago 2, Ill.

This application has been examined.

The drawing and specification do not fully agree. The specification states that the head will oscillate after the spoon is removed from between the jaws, while the drawing does not show structure making the oscillation possible.

The drawing especially Figue 3 should be corrected to show clearance between the bottom of the head and top of the body to allow the head to oscillate.

Also, Figure 2 does not agree with Figure 3, the back of the neck in Figure 2 being shown as extending substantially horizontally and the jaw curving downwardly to the neck, while in Figure 3 there is a straight line connecting the jaw and back of the neck.

The claims are allowed.

Further prosecution before the Primary Examiner is closed under Ex parte Quayle 1935 C. D. 11.

Arthur B. Miller,
Examiner.

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163 Serial No. 36,773 Paper No. 6

Amendment A

(Stamps) Mail Division Sep 17 1938 U. S. Patent Office. U. S. Patent Office Received Sep 20 1948 Div. 57.

IN THE UNITED STATES PATENT OFFICE

Div. 57 Room 5886

Paper No. 6

Ben B. Manaster
Serial No. 36773
Filed July 2, 1948

For: Child's Combination Appetite-Stimulating and Amusement Devices

Hon. Commissioner of Patents
Washington 25, D. C.

Sir:

In response to the Official Action of September 13, 1948, please amend the above-entitled application as follows:

In the specification:

Page 5, line 7, after "20" insert —by pressure of the spoon 29 against the jaw 30—; line 8, cancel "moved" and substitute therefor —tilted—; same line, after "rearwardly" insert —against the action of the shaft 24—; same line, before "spoon" cancel "the" and substitute therefor —this pressure of the—; same line, cancel "contact"; line 9, cancel "with" and substitute therefor —jaw 30—.

(Notation) Entered K. R.

Permission is respectfully requested to amend the drawings as shown in the print attached hereto and pursuant to letter to the Official Draftsman.

(Notation in left-hand margin) Letter for C.

REMARKS.

The specification has been amended to bring out more clearly that the jaw 30 is tilted by pressure of the spoon thereagainst and that when pressure of the spoon is removed from the jaw 30 the resilient shaft 24 will oscillate or vibrate the head for the purposes stated in the specification.

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164 This amendment has been made to meet the objection set forth in the second paragraph of the above referred to Official Action.

Figs. 2 and 3 of the drawing have been amended to meet the objections set forth in the third and fourth paragraphs of the above-entitled application.

This application now appears to be in condition for allowance.

Respectfully submitted,
Ben B. Manaster,
By Clarence E. Threedy,
His Attorney.

Chicago, Illinois
September 16, 1948

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165 Serial No. 36,773 Paper No. 7

Letter (to Defts) (& print)
1 print

(Stamps) Mail Division Sep 17 1948 U. S. Patent Office. U. S. Patent Office Received Sep 20, 1948 Div. 57.

IN THE UNITED STATES PATENT OFFICE
Div. 57 Room 5886

Paper No. 6-A

Ben B. Manaster
Serial No. 36773
Filed July 2, 1948
For: Child's Combination Appetite-Stimulating and Amusement Devices

Hon. Commissioner of Patents
Washington 25, D. C.

Sir:

Attention of Official Draftsman

The Official Draftsman is respectfully requested to amend the drawings of the above-entitled application in the following respects:

Fig. 2 is to be amended as shown in red ink.

Fig. 3 is to be amended pursuant to the illustration on the vellum sketch attached to the print.

These amendments are to be made upon approval of the Examiner in charge of this application, and the cost of such amendments is to be applied to counsel's account.

Respectfully submitted,
Ben B. Manaster,
By Clarence E. Threedy,
His Attorney.

(Notation) OK H. S. 9/21/48.
Chicago, Illinois
September 16, 1948
CET:KY

Govan

(Stamps) Received in Div. C Sep 22 1948. Correction Ordered 2.00 Sep 22 1948 Account. Corrected Oct 8 1948.

24 36773

166 Patent drawing, Patent No. 2,453,922—see index.

167 181—Rev.

Sh/wv 36773

Address Only
The Commissioner of Patents
Washington 25, D. C.

(Stamp) U. S. Patent Office Oct 15 1948 Mailed.
Ben B. Manaster

DEPARTMENT OF COMMERCE

United States Patent Office

Washington

Your application for a patent for an Improvement in Child's Combination Appetite-Stimulating and Amusement Devices, filed July 2, 1948 has been examined and Allowed with 4 claims.

The final fee, Thirty Dollars ($30), With One Dollar ($1) Additional For Each Claim Allowed In Excess of 20 (no less sum can be accepted) must be paid not later than 6 Months from the date of this present notice of allowance. If the final fee be not paid within that period, the patent will be withheld; See Revised Statutes, Section 4885 As Amended By Act Of Congress Approved August 9, 1939.

The office delivers patents upon the day of their date, on which date their term begins to run. The preparation of the patent for final signing and sealing will require about 4 weeks, and such work will not be begun until after payment of the necessary final fee.

When the final fee is paid, there should also be sent, Distinctly And Plainly Written, the name of the Inventor, Title Of The Invention, And Serial Number As Above Given, Date Of Allowance (which is the date of this circular), Date Of Filing, and, if assigned, the Names Of the Assignees.

If it is desired to have the patent issue to an Assignee Or Assignees, an assignment containing a Request to that effect, together with the Fee for recording the same, must be filed in the office on or before the date of payment of the final fee.

The final fee will Not be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Respectfully,
Lawrence C. Kingsland,
~~*Casper W. Ooms,*~~
Commissioner of Patents.

Clarence E. Threedy
111 West Washington Street
Chicago 2, Ill.

Uncertified Checks Will Not Be Accepted.

168 Paper No. 8

Serial No. 36,773
2809

List of References

REFERENCES CITED

The following references are of record in the patented file of this patent:

United States Patents

Name	Number	Date
No references cited.		

Foreign Patents

Country	Number	Date

Other References

169 Div. 57—Room 5886—HS/kr Paper No. 9

Address only The Commissioner of Patents, Washington 25, D. C. All communications respecting this application should give the serial number, date of filing, and name of the applicant.

DEPARTMENT OF COMMERCE

United States Patent Office

Washington

(Stamp) U. S. Patent Office —B— Oct 15 1948 Mailed.

Please find below a communication from the Examiner in charge of this application.

Lawrence C. Kingsland,
Commissioner of Patents.

Division: 57
Applicant: Ben B. Manaster
Ser. No. 36,773
Filed July 2, 1948
For Child's Combination Appetite-Stimulating and Amusement Devices.

Clarence E. Threedy
111 West Washington St.,
Chicago 2, Illinois

In accordance with the provisions of Order No. 2308, dated March 12, 1917, which reads in part as follows:

> Obvious informalities in the application may be corrected by the examiner, but said correction must be in the form of an amendment, approved by the Principal Examiner in writing, placed in the file, and made a part of the record. The changes specified in the amendment will be entered by the clerk in the regular way.

the changes, hereinafter specified, are made by the examiner in the application identified above.

Should these changes not be satisfactory to the applicant, appropriate amendment may be proposed under the provisions of Rule 78, provided the specification has not been printed.

The application has been amended as follows:

On page 5, line 9, the words "the head" have been canceled.

In line 11, same page, "stimulate" has been changed to —simulate—.

(Notation) Entered K. R.

Arthur B. Miller,
Examiner, Div. 57.

H. S.

28 36773

170 Oct 18-48 67298 Bck 30.00

Ck. 30.00 19-18-48 B—$30.00 ck.

(Stamp) Mail Division Oct 18 1948 U. S. Patent Office.

327

FINAL FEE PAID TO THE COMMISSIONER OF PATENTS.

(Be careful to give correct Serial No.)

Serial No. 36773 (Div 57)

Inventor: Manaster
Patent to be Issued to As of record
Name of Invention, as Allowed: Child's Appetite Stimulating Device

Date of Payment: Oct 18, 1948
Fee: $30
Date of Filing:
Date of Circular of Allowance: Oct 11/48

The Commissioner of Patents will please apply the accompanying fee as indicated above.

Clarence E. Threedy,
Attorney.

Send Patent to Attorney of record.

Final fees will not be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office, Nor Will They Be Applied In Pending Applications.

29 36773

171-173 Patent No. 2,453,922—see index.

174 UNITED STATES DISTRICT COURT

District of Northern Illinois—Eastern Division

(Stamp) Commissioner Feb 9 1949 of Patents.
Honorable Commissioner of Patents,
Washington, D. C.

Sir:

In compliance with the Act of February 18, 1922 (42 Stat. L. 392), you are advised that there was filed on the 30th day of December, 1948, in this court an action, suit, or proceeding No. 48 C 1946, entitled:

Name Crest Specialty (Not Inc.), Plaintiff,
Address 663 W. Washington Blvd., Chicago, Ill.

versus

Name Topic Toys, Inc., and Eoina Nudelman, Defendant,
Address 174 W. Jackson Blvd., Chicago, Ill.; 4 East Ohio St., Chicago, Ill.,

brought upon the following patents:

	Patent No.	Date of Patent	Patentee
1	2,455,266	11-30-48 (on or about)	Eoina Nudelman
2	2,453,922	11-16-48	Ben B. Manaster
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....

In the above-entitled case, on the ..... day of ....., 193....., the following patents have been included by .....
(insert amendment, answer, cross bill, or other pleading):

	Patent No.	Date of Patent	Patentee
1	.....	.....	.....
2	.....	.....	.....
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....

In the above-entitled case the following decision has been rendered or decree issued:

.....

.....

In Witness Whereof I have affixed my hand this 7th day of February, 1949, at Chicago, Ill.

Roy H. Johnson,
Clerk of said Court.
By Marguerite Gelman,
Deputy Clerk.

175 UNITED STATES DISTRICT COURT

District of Northern Illinois—Eastern Division

(Stamp) Commissioner Jun 20 1949 of Patents.

Honorable Commissioner of Patents,
Washington, D. C.

Sir:

In compliance with the Act of February 18, 1922 (42 Stat. L. 392), you are advised that there was filed on the 30th day of December, 1948, in this court an action, suit, or proceeding No. 48 C 1946, entitled:

Name Crest Specialty (Not Inc.), Plaintiff,
Address 663 W. Washington Blvd., Chicago, Ill.

versus

Name David C. Trager* d/b/a Topic Toys, Inc., and Eoina Nudelman, Defendant,
Address 174 W. Jackson Blvd., Chicago, Ill.; 4 East Ohio St., Chicago, Ill.,

brought upon the following patents:

	Patent No.	Date of Patent	Patentee
1	2,455,266	11-30-48 (on or about)	Eoina Nudelman
2	2,453,922	11-16-48	Ben B. Manaster
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....

In the above-entitled case, on the ..... day of ....., 193....., the following patents have been included by .....
(insert amendment, answer, cross bill, or other pleading):

	Patent No.	Date of Patent	Patentee
1	.....	.....	.....
2	.....	.....	.....
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....

In the above-entitled case the following decision has been rendered or decree issued:

.....

.....

In Witness Whereof I have affixed my hand this 15th day of June, 1949, at Chicago, Ill.

Roy H. Johnson,
Clerk of said Court.
By Marguerite Gelman,
Deputy Clerk.

* Order approving stipulation amending the original petition herein. Answer to stand. This case is hereby consolidated with cause #49 C 8—Igoe, J. (Entered March 4, 1949.)

176 36773

1948

Contents

1. Application √ papers.
2. Print (1 sht.), July 12, 1948
3. Petition to Commr. to make "Special", Sept. 1, 1948
4. Pet. to Commr. to make "Special" granted, Sept. 9, 1948
5. Letter Sep. 13, 1948
6. Amendment A, Sept. 17, 1948
7. Letter (to Defts) & print, Sept. 17, 1948
8. List of References (Form 480)
9. Exr's Amdt. B, Oct. 15, 1948
10. Notice of Suit Feb. 9-1949
11. Notice of Suit June 20-1949

PLAINTIFF'S CHART
SHOWING
INFRINGEMENT OF CLAIM 3
OF NUDELMAN PATENT

AN AMUSEMENT DEVICE COMPRISING A FIGURE FORMED TO SIMULATE A LIVING CREATURE, SAID FIGURE COMPRISING

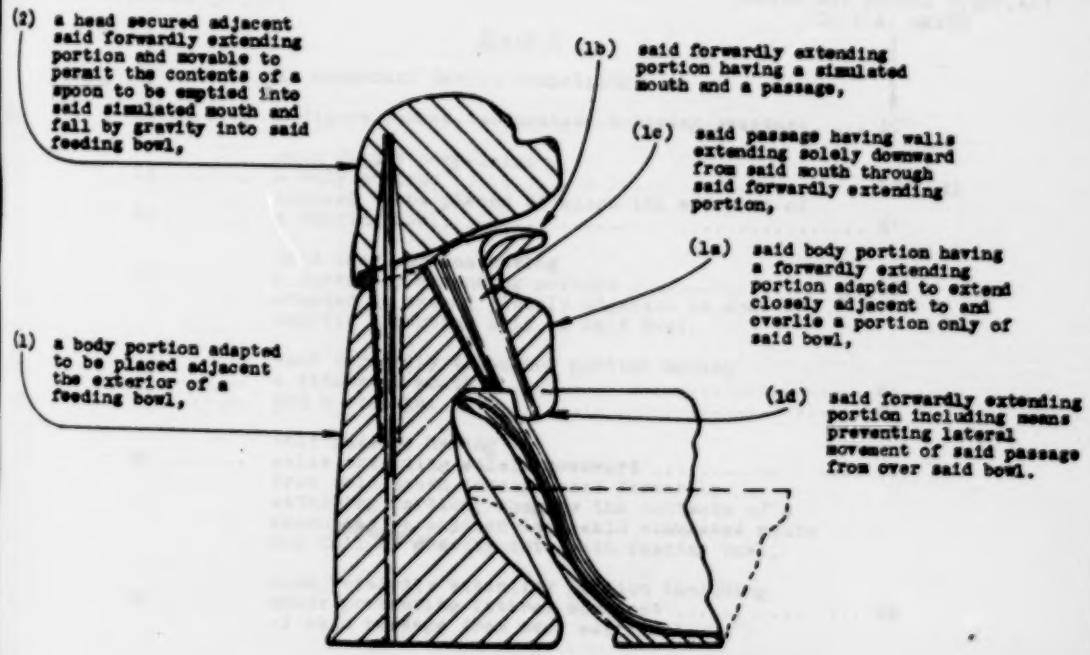


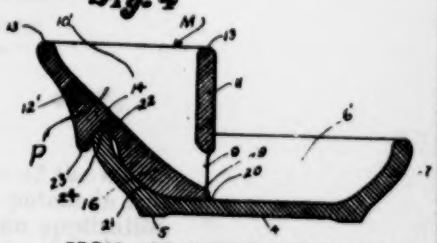
Fig. 3. (MANASTER PAT. NO. 2,453,922) ILLUSTRATING ACCUSED DEVICE

No. 49 C 8
DAVID C. TRAGER, d.b.a. Topic Toys, and EOIMA NUDELMAN, an individual,
Plaintiffs,
v.
CREST SPECIALTY (Not Inc.) a limited partnership consisting of BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, and SOL ELIOT,
Defendants.

Fig. 5

PATENT 2,455,266 IN SUIT

Fig. 4



PRIOR ART PATENT 2,207,417 TO I.A. SMITH

CLAIM 2

An amusement device comprising

10 ..... a figure formed to simulate a living creature, ... 10'

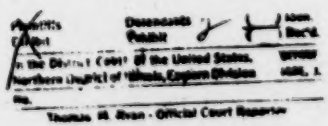
said figure comprising
16 ..... a body portion ..... 12', 23
adapted to be placed adjacent the exterior of
22 ..... a feeding bowl, ... 6'

said body portion having
27 ..... a forwardly extending portion 16
adapted to extend closely adjacent to and overlie a portion only of said bowl,

said forwardly extending portion having
32 ..... a simulated mouth ..... M
24 ..... and a passage, ... P

said passage having
25 ..... walls extending solely downward 14
from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl,

said forwardly extending portion including
20 ..... means preventing lateral movement 22
of said passage from over said bowl.



179 And to wit, on the 19th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

180 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

FINDINGS OF FACT.

1. Plaintiff Eoina Nudelman is the owner of the entire right, title, and interest in and to Nudelman patent in suit No. 2,455,266, issued November 30, 1948, on an application filed February 17, 1948, and entitled "Children's Amusement Device."

2. Plaintiff David C. Trager is now, and has been since May 12, 1948, the exclusive licensee under the patent in suit, and is engaged in the manufacture and sale of the patented device under the trade name Topic Toys.

3. Defendant Crest Specialty is a limited partnership consisting of defendants Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, all residents of the State of Illinois.

4. The Nudelman patent in suit is for a children's amusement device which provides stimulation for chil-
181 dren to eat, and which serves to encourage and educate them to eat, by providing an "eating" table companion which is fed from the same bowl, with the same spoon and the same food as the child. This device is not merely a toy, but is highly utilitarian in character and has decided educational and psychological value.

(a) The Nudelman patent in suit shows a simulated animal figure in the form of a small pig, having a body portion adapted to be positioned closely adjacent the exterior of a feeding bowl. The body portion has a forwardly extending portion projecting closely adjacent to the rim of the bowl and overlying a portion of the bowl. The forwardly extending portion assumes the form of the front paws or feet of the animal figure, and has a simulated mouth and a passage. The passage has walls extending solely downward from the mouth through the forwardly extending portion. A head is secured adjacent to the forwardly

extending portion, and is movable to permit the contents of a spoon to be emptied into the mouth and to fall by gravity into the feeding bowl. The forwardly extending portion has an undercut for engagement with a bowl, to prevent lateral separation of the animal figure from the bowl during feeding, so that food emptied into the animal's mouth will pass back immediately into the bowl. The portion of the animal figure overhanging the top of the bowl does not extend all the way into the bowl, and therefore the capacity or area of the bowl is not reduced in any way by virtue of the short downward wall extending from the mouth. The device of the patent in suit permits baby food emptied into the animal's mouth to immediately drop back into the bowl without clogging the passage and without wasting any food.

5. The inventive concept of Nudelman is well grounded in psychology. It takes full advantage of the process
182 of mimicry, which in the final analysis is the foundation of practically all methods of instruction employed for infant children. The Nudelman device was the first ever to teach the idea of providing an "eating" table companion for a young child which utilizes the psychological process of mimicry in providing the companion to be fed either by the mother or the child itself simultaneously with the feeding of the child. The feeding of the table companion with the same food and from the same bowl and the apparent appearance of the animal consuming food provides a stimulant for the child to do likewise.

6. It was of the essence of Nudelman's concept that the device, employed for the purpose of providing instruction and encouragement for the child, simulate a living creature comprehensible to a child, and have body, head, and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing, and encouraging the child to join the "eating" table companion and to eat.

7. It is recognized that many children in the early tender years are poor eaters and have to be encouraged and otherwise stimulated to eat by various artifices, and that this problem has existed for a long period of time. The device of the Nudelman patent in suit was directed toward solving that problem and is the first device of its character to aid in the solution of such a problem.

8. Prior to February 17, 1948, the efforts to deal with the problem of holding the interest of infant children dur-

ing feeding periods and of encouraging them to eat were fundamentally and basically quite different from the means employed by Nudelman. These prior attempts consisted of nothing more than the utilization of knives and forks with handles simulating living creatures or of deco-
183 rated dishes or bowls. L'Heureux patent No. 2,200,-696, dated May 14, 1940, and Ide patent No. 2,224,683, dated December 10th, 1940, disclose typical devices employed in the attempted solution of the problem which was dealt with by Nudelman.

9. Prior to February 17, 1948, there was a substantial demand for a device like that shown, described, and claimed in the Nudelman patent in suit. Defendant Sol Eliot, who had been in the business of manufacturing and selling related items for a number of years prior to 1948, found, as the result of a survey made by him, that there was a market in 1948, for a device like that shown and described in the Nudelman patent, and he estimated as of August, 1948, that such a device could be sold and distributed and otherwise put into commerce in large numbers, to-wit, 90,000 per month.

10. The device shown, described, and claimed in the Nudelman patent in suit was unique and ingenious and constituted a genuine improvement over any prior device either shown, described, or manufactured and sold in this country. Defendants have characterized their own device charged herein to infringe as incorporating a "sensational new idea" and as the "recognized new idea that makes children willing eaters." In their advertisements defendants have proclaimed that their device charged herein to infringe is sparked with cleverness, color, and imagination and is an "unusual" item. In the period from September, 1948, through September, 1949, plaintiff Trager has sold 191,368 feeding devices under the Nudelman patent in suit, this representing a retail sales dollar volume between $180,000.00 and $185,000.00.

11. Plaintiff Trager began the construction of molds for the commercial manufacture of the device shown, described, and claimed in the Nudelman patent in suit
184 on or about May 12, 1948. Prior thereto and thereafter he distributed handmade samples of the device to various prospective buyers, and by means of salesmen began the solicitation of orders therefor. Defendants derived the device herein charged to be infringed from the plaintiffs, it being admitted by defendant Ben B. Manaster

that the accused device was copied from the device of the plaintiffs.

12. After learning of the device of the Nudelman patent in suit, the defendant Ben B. Manaster filed an application for patent on July 2, 1948, which matured into patent No. 2,453,922, dated November 16, 1948. As filed, all of the claims of this application were specific and limited to the specific construction disclosed in the Manaster application in which the head of the animal was secured to the body portion thereof by means of a spring member or to a construction in which the head of the animal oscillated with respect to the body of the animal when engaged by a spoon. This patent is subsidiary and tributary to the patent in suit. Although the Nudelman and Manaster patents were copending, no interference therebetween was declared by the United States Patent Office under its Rules of Practice, for the reason that Manaster showed a different species from that of Nudelman, and because Manaster was claiming his species specifically whereas Nudelman was claiming the invention generically.

(a) Subsequent to the issuance of the Nudelman patent in suit, and prior to the bringing of this action, defendants have made and sold, within the Northern District of Illinois, devices like that of the Manaster patent and as exemplified by Plaintiff's Exhibit No. 2. This device which is charged as an infringement in this action consists of an animal figure in the form of a puppy. The body portion of the puppy is designed and intended to be positioned outside and closely adjacent to a feeding bowl.
185 The animal has a simulated mouth, and its front paws overhang the rim of the bowl and does not extend all the way into the bowl in such manner as to reduce the capacity or area of the bowl. A passage extends downward from the mouth through the front paws and is in open communication with the bowl. A head is secured adjacent the forwardly extending portion of the body, this head being movable to permit the contents of a spoon to be emptied into the mouth. The front paws of the animal have an undercut which engages the bowl and prevents lateral separation of the animal figure from the bowl during the feeding so that the food emptied into the animal's mouth will pass back immediately into the bowl. This device is admittedly one intended to encourage and stimulate infant children to eat. Thus in the Manaster patent it is stated that the device shown therein "will have the effect

of inducing the child to alternately feed itself and the character, thus stimulating the child to consume its food." It also appears from the said Manaster patent that the purpose of the undercut and the overhanging paws slightly depending into the bowl is that of preventing the bowl and the body portion from being easily moved apart.

13. Defendants' device accused herein responds to claims 2 and 3 of the Nudelman patent which are in suit, and constitutes an infringement of each of said claims.

14. Smith patent No. 2,207,417, dated July 9, 1940, entitled "Cereal Bowl", is relied upon by defendants as anticipating claim 2 of the Nudelman patent in suit. Together and in combination with other patents, such as No. 226,831 to Bowen, dated April 27, 1880, No. 843,024 to Livingston, dated February 5, 1907, No. 1,751,773 to Trosper, dated March 25, 1930, and No. 1,792,129 to Theodoropulos, dated February 10, 1931, this Smith patent 186 is also relied upon to negative novelty and invention in the structure of claim 3 of the patent in suit. Defendants also introduced in evidence, but did not have their patent expert explain or describe, Smith patent No. 2,170,-311, dated August 22, 1939; Shea patent No. 356,168, dated January 18, 1887, and MacMorris patent No. 516,354, dated March 13, 1894.

15. The Smith patent No. 2,207,417 does not, either alone or in combination with other patents, show the device of the Nudelman patent in suit to be lacking in novelty. The structure of Smith is not only entirely dissimilar to that of Nudelman, but the two devices are diametrically opposed in purpose and function.

(a) The Smith patent discloses a cereal bowl having a hopper or bin positioned inside thereof for separating the cereal and milk. The hopper or bin of the Smith patent is between one third to one half the size of the bowl. The hopper is placed inside and within the bowl and correspondingly reduces the capacity and size of the bowl. The hopper has an inclined wall extending upwardly and rearwardly of the bowl and has a side opening leading into the bowl. The hopper or bin is filled with cereal in the same manner as a storage bin, and milk is poured into the bowl. The hopper merely serves to separate and keep the cereal from contacting the milk so that the cereal is maintained in a crisp condition until eaten. In eating, the spoon is placed adjacent the side bottom outlet to gather the dry

cereal that drops from the bin in measured quantities, the spoon simultaneously taking up some of the milk in the bowl. The user thus eats a cereal which is momentarily saturated with the milk in the spoon.

(b) It is the avowed purpose of Smith, repeatedly stressed in the patent, to maintain precooked dry
187 cereals in the hopper and bin separated from the milk, thereby to retain original crispness and to aid digestion by more intensive mastication of food. The hopper of Smith was not designed or intended to perform the function of the device shown in the Nudelman patent. Moreover, it is contrary to the express purpose of the Smith device to return food to the hopper from the bowl. The device of the Smith patent has an object in view which is entirely different from that of Nudelman. It is used under radically different conditions to perform a function quite different from that of the Nudelman device, and it employs an antithetical principle of operation.

(c) A demonstration in court by defendants' patent expert of a model of the Smith patent presented by him showed that Smith is at least inoperative when employed for the purpose of repeatedly returning to the hopper one type of dry cereal mixed with milk.

(d) Defendants' patent expert admitted that it is contrary to Smith's express teachings to take spoonfuls of mixed cereal and milk from the bowl and put them back into the hopper. He also conceded that there is no suggestion or hint in the Smith patent of such an operation. He admitted that he was unable to find in the Smith patent any teaching of stimulating and encouraging infants to eat by psychology and mimicry. The reference in the Smith patent to holding the interest of children was conceded by defendants' expert to refer to a concept quite different from that of Nudelman.

(e) The testimony of defendants' patent expert in which he applied the language of claim 2 of the Nudelman patent in suit to the structure of Fig. 4 of the Smith patent must be rejected as lacking in verity. This testimony constituted an unreasonable distortion of the language
188 of the claim, and wholly failed to take into account the meaning and sense of the language, the disclosure of the patent in suit and its objects and purposes. Read upon the device of Fig. 4 of the Smith patent, claim 2 of the Nudelman patent in suit ceases to represent the in-

vention of Nudelman. Among other things, the main, central, or principal portion of Smith's hopper is within the bowl, and it cannot be said that the small portion of the wall 12 and the projection 23 which are exterior of the bowl, constitute the "body portion" of the hopper.

16. The other patents relied on by defendants are no more pertinent than Smith patent No. 2,207,417. None of those patents discloses or suggests the device and structure described and claimed in the patent in suit. While it is true that the Bowen, Livingston, Trosper, and Theodoropulos patents disclose hinged heads of various animal figures, none of these devices were designed or intended to serve as an "eating" table companion for a young child, and none purport to take advantage of the psychological proce..s of mimicry to encourage and stimulate infant children to eat. In their respective environments these hinged heads accomplish functions and purposes quite foreign to the function and purpose of the device of the patent in suit.

17. The conception and production of a device like that shown and described in the Nudelman patent in suit was beyond the skill of a mechanic, and required the exercise of inventive genius.

189 Conclusions of Law.

1. The Court has jurisdiction of the parties and of the subject matter.

2. The patent in suit was regularly issued by the United States Patent Office. Defendants in assailing it have a heavy burden of proof.

3. To anticipate the patent in suit—or to show that the device thereof was lacking in novelty—the prior patent must show the device or its substantial equivalent doing the same work in substantially the same manner as the patented device.

4. Patents cannot be anticipated by prior devices which might, by modification, be made to accomplish the function performed by the device of the patent in suit when those devices were not designed, adapted, or used to perform the same function and where the prior patent contains no suggestion of the way in which the result sought is accomplished.

5. Prior art patents are to be measured as anticipa-

tions by what is clearly and definitely expressed in them; they may not be reconstructed in the light of the invention in suit and given a significance and importance which in fact they did not have in the art; they may not be reconstructed in the light of later acquired knowledge and then used as a part of the prior art.

6. The conception and production of the device of the patent in suit required the exercise of invention and the presence of that invention is persuasively demonstrated by the evidence.

7. The patent in suit describes, and claims 2 and 3 claim, a new and highly utilitarian device which was inventive, involves a new principle and function, and achieves a beneficial result. It is therefore good and valid in law.

8. Each of claims 2 and 3 of the Nudelman patent in suit embodies and covers a device like that shown and
190 described in that patent. The language of the claims is clear and unambiguous and complies with the patent statute in particularly pointing out and claiming the improvement asserted as an invention.

9. The claims in suit are not limited to the exact details of the specifications, but include all substantial equivalents which do the same work in substantially the same way and accomplish substantially the same result.

10. Defendants' device herein accused as an infringement is substantially the same as that shown and described in the Nudelman patent in suit; it literally and in substance responds to the language of the claims in suit and infringes each of said claims.

11. The issuance of Manaster patent No. 2,453,922 does not create a presumption of non-infringement by the device shown and described therein.

12. The comparative utility of the patented device and the accused device is immaterial. That the accused device does not work as perfectly as plaintiffs' device does not avoid infringement.

13. Plaintiffs are entitled to judgment and to their costs as in such cases made and provided by law.

Enter:

Igoe,
United States District Judge.

January 19, 1950.

191 And afterwards, to wit, on the 26th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

192 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

JUDGMENT.

This Cause having come on to be heard upon the pleadings and proofs, and having been argued by the parties, upon consideration thereof and upon the findings of fact and conclusions of law entered herein on January 19, 1950, it is

Ordered, Adjudged, and Decreed:

1. That claims 2 and 3 of United States Letters Patent No. 2,455,266, granted November 30, 1948, to Eoina Nudelman for "Children's Amusement Device," are good and valid in law.

2. That plaintiff Eoina Nudelman is the owner of all of the right, title, and interest in, to, and under said patent, and plaintiff David C. Trager, doing business as Topic Toys, is the exclusive licensee thereunder.

3. That the defendant Crest Specialty (not inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, has since the issuance of said United States Letters Patent No. 2,455,-266 infringed the said letters patent by manufacturing and selling within the Northern District of Illinois and else-
193 where, amusement devices embodying the inventions covered by claims 2 and 3 of the said letters patent in violation of the exclusive rights of plaintiffs under said claims.

4. That an injunction be issued out of and under the seal of this Court, pursuant to the prayer of the Complaint herein, directed to Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, permanently enjoining and restraining them, individually, and as copartners comprising the limited partnership known as Crest Specialty, their clerks, servants, agents, employees, and those in active concert or participation with them, and each and every one of

them, from directly or indirectly manufacturing or selling, or offering and advertising to manufacture or sell, amusement devices like the puppy figure included in Plaintiffs' Exhibit 2 or any colorable modification thereof or other device embodying the invention covered by claims 2 and 3 of United States Letters Patent No. 2,455,266, or in any way violating the rights of plaintiffs under said claims.

5. That plaintiffs recover from defendants the general damages which plaintiffs have sustained by reason of said infringement by said defendants of claims 2 and 3 of said United States Letters Patent No. 2,455,266 which shall be due compensation to plaintiffs for making or selling the said invention, not less than a reasonable royalty therefor; and that plaintiffs recover their costs and taxable disbursements to date.

6. That this cause be referred to Victor LaRue, Esq., as special master of this Court, to ascertain and report the amount of the general damages which have accrued to plaintiffs by reason of defendants' said infringement
194 of claims 2 and 3 of United States Letters Patent No. 2,455,266. The said special master shall have full power and authority, as provided under the Rules of Civil Procedure and without any limitation, to regulate all proceedings in every hearing before him and to require the production before him of evidence upon all matters embraced in this reference; and he shall forthwith proceed with said reference and take and receive the evidence presented by the parties and report his findings and conclusions thereon.

Enter:

Igoe,
United States District Judge.

195 And on the same day, to wit, the 26th day of January, 1950, came the Defendant, Crest Specialty (Not Inc.) by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal, in words and figures following, to wit:

196 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an individual, *Plaintiffs,* *vs.* Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, *Defendants.*	Civil Action No. 49 C 8

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS UNDER RULE 73(b).

Notice is hereby given that Crest Specialty (Not Inc.), the defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment entered in the above-entitled cause on January 26, 1950.

Signed at Chicago, Illinois, this 26th day of January, 1950.

Clarence E. Threedy,
111 West Washington Street,
Chicago, Illinois,
Attorney for Defendant.

(Certificate of Mailing Attached Hereto):

197 United States of America, }
Northern District of Illinois. } ss.

Certificate of Mailing.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on January 26, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Max R. Kraus,
33 N. La Salle St.,
Chicago, Illinois.

Thiess, Olson & Mecklenburger,
77 W. Washington St.,
Chicago, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 26th day of January, A. D., 1950.

Roy H. Johnson,
Clerk,

By Gizella Butcher,
Deputy Clerk.

(Seal)

198 And afterwards on, to wit, the 30th day of January, 1950, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points, in words and figures following, to wit:

199 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

STATEMENT OF POINTS.

Defendant, Crest Specialty (Not Inc.), intends to rely on the following points on its appeal to the Court of Appeals for the Seventh Circuit from the judgment entered in this cause on the 26th day of January, 1950, to-wit:

1. The court erred in finding and decreeing that defendant's device in evidence as Plaintiff's Exhibit 2 infringed each of claims 2 and 3 of the Nudelman patent in suit, No. 2,455,266 issued November 30, 1948.

2. The court erred in not finding and decreeing each of claims 2 and 3 of the Nudelman patent in suit, No. 2,455,266, invalid for want of invention and by reason of anticipation in view of the following prior art patents:

Patent No.	Date	Patentee
226,831	April 27, 1880	Bowen
356,168	January 18, 1887	Shea
516,354	March 13, 1894	MacMorris
843,024	February 5, 1907	Livingston
1,751,773	March 25, 1930	Trosper
1,792,129	February 10, 1931	Theodoropulos
2,170,311	August 22, 1939	E. P. Smith
2,207,417	July 9, 1940	I. A. Smith

200 3. The court erred in finding and decreeing claims 2 and 3 of the Nudelman patent in suit, No. 2,455,266, valid over the prior art hereinbefore listed.

4. The court erred in not dismissing the plaintiffs' complaint for want of equity.

Clarence E. Threedy,
Attorney for Defendant.

Chicago, Illinois.

Received a copy of the foregoing Statement of Points this 30 day of January, 1950.

Sidney Neuman,
Max R. Kraus,
Attorneys for Plaintiffs.

201 And on the same day, to wit, on the 26th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

202 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

SUPERSEDEAS ORDER.

Now comes the defendant named in the above-entitled cause, by its attorney, Clarence E. Threedy, and prays for a supersedeas order as to all proceedings in this cause including injunction, accounting and costs during the pendency of an appeal to the United States Court of Appeals for the Seventh Circuit from the judgment heretofore entered in this cause;

Whereupon, it is ordered that upon the filing of a bond in the penal sum of Five Thousand ($5,000.00) Dollars with surety to be approved by the court, the said appeal shall operate as a supersedeas and all further proceedings in said cause, including the effect of the injunction, accounting and collection of costs shall be stayed during the pendency of said appeal.

Entered this 26th day of January, 1950.

Igoe,
United States District Judge.

203 And afterwards, to wit, on the 27th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

204 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

Comes now the defendant by counsel and presents its supersedeas bond herein for approval and it appearing to the Court that said bond is properly conditioned and in the amount fixed by the Court, i. e., Five Thousand Dollars ($5,000.00), and that the sureties are good and sufficient security for said amount it is

Ordered that said bond be and it is hereby approved.

205 And on, to wit, the 27th day of January, 1950, there was filed in the Clerk's office of said Court a certain Bond on Appeal, in words and figures following, to wit:

206 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

BOND ON APPEAL.

Know All Men By These Presents:

That we, Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto David C. Trager, doing business as Topic Toys, and Eoina Nudelman, in the full and just sum of Five Thousand Dollars ($5,000.00) to be paid to the said David C. Trager, doing business as Topic Toys, and Eoina Nudelman, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand nine hundred and fifty.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a case entitled David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an individual, 207 Plaintiffs, *vs.* Crest Specialty (Not. Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, Defendants, Civil Action No. 49 C 8, a judgment was rendered against said defendant, said defendant has filed or is about to file in the Clerk's Office of said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse said judgment in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from date hereof.

Now, the condition of the above obligation is such that if the said Crest Specialty shall prosecute its appeal to effect and shall pay all costs which may be awarded to said David C. Trager and Eoina Nudelman and all damages or other award which may be given to said David C. Trager and Eoina Nudelman, then the above obligation to be void; otherwise to remain in full force and effect.

Sealed and delivered in presence of:

Crest Specialty (Not Inc.)
By Ben B. Manaster (Seal)
A member of the partnership

Continental Casualty Company
By Robt. Griffith (seal)
Attorney-in-fact.

Approved:

Igoe,
United States District Judge.

(Power of Attorney Attached But Not Copied.)

208 And on the same day to wit, on the 30th day of January, 1950, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

209 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

ORDER.

Upon consent of the parties, it is hereby ordered that the original documentary exhibits designated by the parties hereto may be sent to the Clerk of the United States Court of Appeals for the Seventh Circuit in connection with the appeal of this case as a part of the transcript, and that the following original exhibits be certified to the said Clerk as physical exhibits:

Plf. Exh. 2—Def. box and contents consisting of puppy, bowl, spoon and fork, and cup.

Plf. Exh. 3—Plf. large box and contents consisting of piggy, bowl, fork and spoon, and rack for fork and spoon.

Plf. Exh. 4—Plf. small box and contents consisting of piggy and bowl.

Def. Exh. 3—Cereal bowl.

Def. Exh. 3a—Model of Fig. 4 of Smith patent 2,207,417.

Entered this 30th day of January, 1950.

Igoe,
United States District Judge.

Above order is approved and consented to:

Sidney Neuman,
Max R. Kraus,
Attorneys for Plaintiff.

Clarence E. Threedy,
Attorney for Defendant.

210 And on the same day to wit, the 30th day of January, 1950 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Designation Of Record On Appeal in words and figures following, to wit:

211 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—49-C-8) • •

DEFENDANT'S DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Pursuant to the Notice of Appeal filed in the above-entitled cause by defendant, Crest Specialty (Not Inc.), and pursuant to the Rules of Civil Procedure, you are hereby requested to authenticate and transmit to the Clerk of the U. S. Court of Appeals for the Seventh Circuit, copies of the following papers and original exhibits filed in the above-entitled cause, which papers and exhibits are hereby designated as the portions of the record, proceedings and evidence to be contained in the record on appeal, to-wit:

1. Complaint filed January 4, 1949.
2. Defendant's Answer filed February 4, 1949.
3. Stipulation dated October 11, 1949.
4. Transcript of the proceedings taken in open court at the trial, commencing with page 39 and ending with page 144, and the subject matter on page 198 beginning with line 3 thereof and ending with line 20 thereof.

212 5. Findings of Fact and Conclusions of Law entered by Judge Igoe January 19, 1950.
6. Judgment of District Court entered January 26, 1950.
7. Notice of Appeal.
8. Certificate of the Clerk of the District Court as to the names of the persons to whom copies of the notice of appeal were mailed and date of mailing.
9. Supersedeas order.
10. Supersedeas bond.
11. Defendant's statement of points on which it intends to rely on appeal.

12. This designation of record.

13. Order of District Court with reference to transmitting original exhibits to Clerk of U. S. Court of Appeals.

14. Certificate of the Clerk of the District Court.

15. Plaintiff's Paper Exhibits to be printed:

Plf. Exh. 1—Copy of Nudelman patent in suit 2,455,266.

Plf. Exh. 5—Plf. printed literature describing contents of its box.

Plf. Exh. 6—Tabulation of plaintiff's sales.

Plf. Exh. 7—Photograph of contents of plaintiffs' box.

Plf. Exh. 8—Plaintiff's circular.

Plf. Exh. 9—Newspaper advertisement of plaintiff.

Plf. Exh. 10—Plaintiff's photograph used for publicity purposes.

Plf. Exh. 11—Photostat of newspaper clippings.

Plf. Exh. 12—Photostat of Defendant's advertisement in "Toys & Novelties" for October 1948.

Plf. Exh. 13—Copy of Manaster patent 2,453,922.

Plf. Exh. 14—File wrapper of Manaster patent 2,453,922.

Plf. Exh. 15—Plaintiff's chart of comparison between claims of Nudelman patent in suit and defendant's device.

16. Plaintiff's physical exhibits:

Plf. Exh. 2—Defendant's box and contents consisting of puppy, bowl, spoon and fork, and cup.

Plf. Exh. 3—Plaintiff's large box and contents consisting of piggy, bowl, fork and spoon, and rack for fork and spoon.

Plf. Exh. 4—Plaintiff's small box and contents consisting of piggy and bowl.

213 17. Defendant's Paper Exhibits to be printed:

Def. Exh. 1—Book of Prior art consisting of copies of

Patent Nos. 226,831.
356,168.
516,354.
843,024.
1,751,773.
2,170,311.
2,207,417.

Def. Exh. 2—Defendant's chart of comparison between claim 2 of Nudelman patent in suit and Smith patent 2,207,417.

Def. Exh. 4—Copy of Theodoropulos patent 1,792,129.

Def. Exh. 5—File wrapper of Nudelman patent in suit 2,455,266.
Def. Exh. 6—Copy of patent 2,200,696.
Def. Exh. 7—Copy of patent 2,224,683.
18. Defendant's physical exhibits:
Def. Exh. 3—Cereal bowl.
Def. Exh. 3a—Model of Fig. 4 of Smith patent 2,207,417.

Clarence E. Threedy,
Attorney for Defendant.

Received a copy of the foregoing designation this 30th day of January, 1950.

Sidney Neuman,
Max R. Kraus,
Attorneys for Plaintiffs.

214 And afterwards on, to wit, the 2nd day of February, 1950 came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Additional Designation Of Record On Appeal in words and figures following, to wit:

215 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-8) * *

PLAINTIFFS' ADDITIONAL DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Now come plaintiff by their attorney and pursuant to the Rules of Civil Procedure, hereby designate the following additional portions of the record proceedings and evidence to be contained in the Record on Appeal to-wit:

1. With respect to Item 4 of "Defendants' Designation of Record on Appeal" add

(a) the material beginning at line 21 of page 162 to and including line 4 of page 164, and

(b) lines 3 to 19 of page 195.

Sidney Neuman,
Attorney for Plaintiffs.

Received a copy of the foregoing additional designation this 2nd day of February, 1950.

Clarence E. Threedy,
Attorney for Defendants.

Nov. 30, 1948. E. NUDELMAN 2,455,266

CHILDREN'S AMUSEMENT DEVICE

Filed Feb. 17, 1948

Fig. 2.

Fig. 4.

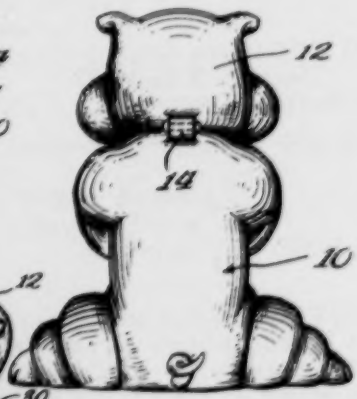


Fig. 5.

Fig. 1.

Fig. 3.

Inventor
Eloina Nudelman
By Max K Kraus
Atty

UNITED STATES PATENT OFFICE

2,455,266

CHILDREN'S AMUSEMENT DEVICE

Eoina Nudelman, Chicago, Ill.

Application February 17, 1945, Serial No. 8,761

3 Claims. (Cl. 46—141)

1

This invention relates to a children's amusement device, and one which will also provide a stimulant for children to eat.

It is a well established fact that children, particularly in their early years are poor eaters and parents have to provide various attractions to interest a child during feeding time.

One of the objects of this invention is to provide an amusement device, attachable to the child's feeding bowl and having means whereby the device can be fed and the food returned to the bowl.

In the drawings:

Fig. 1 is a perspective view of my amusement device.

Fig. 2 is a view showing it secured on the bowl.

Fig. 3 is a view showing the head tilted back as by a spoon, and

Fig. 4 is a rear view of the device.

Fig. 5 is a modified form of construction.

The device may be molded of plastic or stamped of any material and the preferred form of my invention may be made of two pieces, one comprising a body portion, generally indicated at 10 and the other the head portion 12, pivoted or hinged as at 14 to the body, to permit the head to be tilted back. The body portion 10 is formed to simulate a character, and in the instance shown, the body of a pig, although it will be understood that any animal or figure can be thus formed. The body is shaped to provide a concave surface 16 which engages the outside of the bowl and a forwardly projecting portion 18, which as shown forms the front legs of the pig character. The forwardly projecting portion overhangs the front of the bowl when positioned thereon and has undercut portions 20 which rest on the top of the bowl 22 and forms the hooking means by which the device is firmly secured to the bowl. The forwardly projecting part of the body is hollow as at 24 and the top 26 of the body portion upon which the head rests forms in effect the mouth into which the spoon contents are poured. The rear wall 25 encompassing the hollow body portion 24 extends slightly below the top of the bowl and into the bowl to form an apron 27 so that the food will all empty into the bowl.

The head 12 is pivotally hinged to the body portion at the rear thereof by any suitable hinge 14 to permit the head to be tilted backward as shown in Fig. 3, to expose the opening 28 and permit the contents of the spoon to be emptied into the hollow body 24 and from which it passes to the bowl 22.

2

The head can be tilted or pivoted backward by the spoon even when the spoon is full. The weight of the head will permit it to fall to a closing position when the spoon is removed, or the head can be weighted to remain in raised position until closed by tapping it with the spoon.

If desired this device can be made of one piece, as shown in Fig. 5, where the head and body are integrally formed as at 38 with the mouth portion 32 open permanently so as to receive the contents of the spoon. The device is secured to the bowl as previously described and the hollow body permits the food to pass into the bowl.

This device affords considerable interest to the young child as the mother can feed the child and the amusement device, thus providing a stimulant for the child to eat. The device can readily be attached to and detached from the bowl and can be easily cleaned.

I claim:

1. An amusement device comprising a figure formed to simulate a living creature, said figure comprising a forwardly extending portion, means adapted to attach said figure to the edge of a feeding bowl with said forwardly extending portion closely overlying a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl.

2. An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

3. An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie

RK PAGE BLEEDTHRU

a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, and a head secured adjacent said forwardly extending portion and movable to permit the contents of a spoon to be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

EOINA NUDELMAN.

REFERENCES CITED

The following references are of record in the file of this patent:

UNITED STATES PATENTS

Number	Name	Date
236,831	Bowen	Apr. 27, 1880
356,168	Shea	Jan. 18, 1887
843,934	Livingston	Feb. 5, 1907
1,751,773	Trosper	Mar. 25, 1930

136

J. H. BOWEN.

Toy Money-Box.

No. 226,831. Patented April 27, 1880.

Fig. 1.

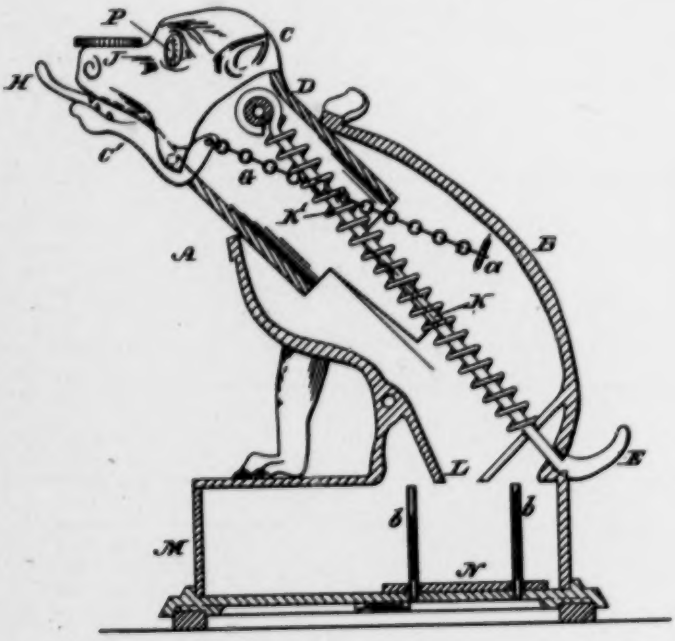
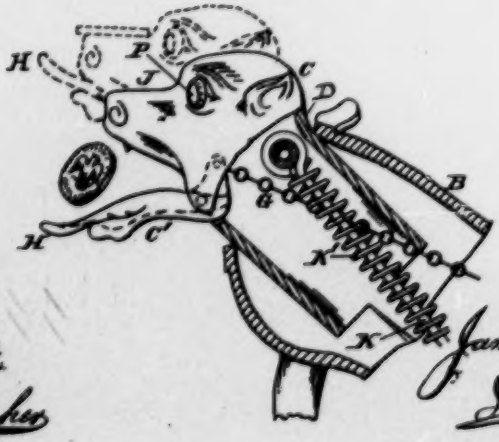


Fig. 2.



Witnesses:

E. A. Burtt

H. C. Fischer

Inventor:

James H. Bowen,

John A. Lindenbaum

ATTORNEY.

UNITED STATES PATENT OFFICE.

JAMES H. BOWEN, OF PHILADELPHIA, PENNSYLVANIA.

TOY MONEY-BOX.

SPECIFICATION forming part of Letters Patent No. 226,881, dated April 27, 1880.

Application filed February 14, 1880.

To all whom it may concern:

Be it known that I, JAMES H. BOWEN, a citizen of the United States, and a resident of the city and county of Philadelphia, and State of Pennsylvania, have invented a new and useful Improvement in Toy Money-Boxes; and I do hereby declare the following to be a specification thereof, reference being had to the accompanying drawings, in which—

Figure 1 is a partial side elevation and vertical section of the toy money-box embodying my invention. Fig. 2 is a view of a portion thereof, some of the parts being in different position.

Similar letters of reference indicate corresponding parts in the two figures.

My invention consists of a toy money-box of the figure of a dog or other animal or being having a movable head and an opening mouth, all so disposed that when a quick rearward motion is imparted to the head the mouth opens and the coin, previously placed on the head of the figure, leaves its seat by inertia, and is caught by the mouth and thus directed into the body of the figure.

Referring to the drawings, A represents the figure of an animal—in the present case of a dog—consisting of a hollow body, B, a sliding head, C, whose neck D, properly guided within the body, is adapted to move in and out of the same, and a movable tail, E, for imparting the inward or rear motion to the head, the parts being preferably cast metal.

The animal has a movable mouth formed by hinging the lower jaw, C′, to the head, and to the rear of said jaw is attached one end of a chain or rod, G, whose other end is connected to the body of the figure, as at *a*, for holding the mouth in a closed position.

H represents the tongue of the animal, which is represented as extended, and projects beyond the nostrils, and J represents a horizontal ledge, flat portion, or seat on the head over the nostrils.

Attached to the inner end of the tail E is a rod, K, which is guided in proper walls of the body B and connected to the head C. A spring, K′, encircles the rod, and has its upper end connected to the upper end of said rod, and the lower end bearing against the body B.

The body B is supported on a box, M, which constitutes the base of the device and forms the receptacle for the coin or money, and communication is had between the body A and box M by means of a chute, L, at the lower end of the body. Rising from the box M are pins *b b*, on which is loosely fitted a plate, N, which is so disposed that when the device is overturned said plate shifts from the bottom of the box and slides against the walls of the chute L, which is thereby closed, as a trap, and prevents abstraction or escape of the money.

The operation is as follows: A coin is placed on the ledge J, and the tail E is drawn rapidly out or rearward, whereby, owing to the rod K, a quick motion is imparted to the head. The jaw C′, if connected to a chain, G, is no longer controlled thereby, and falls by gravity; but if connected to a rod the latter imparts a positive motion to the jaw, so that in either case the mouth opens. Owing to the impulse of the head, the loosely-supported coin loses its seat on the ledge J and falls, and is caught on the tongue H. The tail is let go, and the parts immediately assume their normal positions, the chain or rod G closing the jaw or mouth, and the coin then falls through the throat of the animal into the body B, and is directed by the chute L to the box M.

It will be seen that the action of the animal is apparently that of snapping at the coin and then swallowing it, thus presenting an amusing toy.

P represents glass eyes, which may be cemented to or embedded in the metal head C, and serve to add to the life-like appearance of the animal.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. A toy money-box consisting of a body, in the form of a dog or other animal or being, having a head adapted to move and a mouth adapted to be opened, substantially as described, whereby when the head is moved quickly back the mouth opens and the coin,

previously placed on the head, leaves its seat by inertia, and is caught by the mouth of the figure and directed into the body of the same, substantially as specified.

2. The body B, movable head C, coin-catching mouth C′, tail E, rod K, spring K′, and connection G, combined and operating substantially as and for the purpose set forth.

3. The coin-receiving body B and chute L and the base M, in combination with the trap consisting of the sliding plate N, fitted on the pins *b*, and operating as and for the purpose set forth.

J. H. BOWEN.

Witnesses:
JOHN A. WIEDERSHEIM,
W. F. KIRCHER.

(No Model.)

T. R. SHEA.

CIGAR TIP CLIPPER.

No. 356,168. Patented Jan. 18, 1887.

Fig. 1.

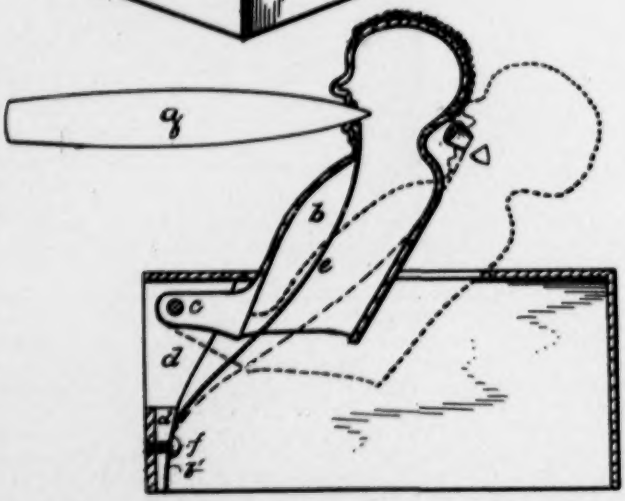


Fig. 2.

WITNESSES:
A. F. H. Pillsbury.
Allen Webster

INVENTOR
Timothy R. Shea

UNITED STATES PATENT OFFICE.

TIMOTHY R. SHEA, OF SPRINGFIELD, MASSACHUSETTS.

CIGAR-TIP CLIPPER.

SPECIFICATION forming part of Letters Patent No. 356,168, dated January 18, 1887.

Application filed June 28, 1886. Serial No. 206,531. (No model.)

To all whom it may concern:

Be it known that I, TIMOTHY R. SHEA, a citizen of the United States, residing in Springfield, in the county of Hampden and State of Massachusetts, have invented new and useful Improvements in Cigar-Tip Clippers, of which the following is a specification, reference being had to the accompanying drawings, and letters of reference marked thereon.

I am well aware that cigar-tip clippers or cutters have been heretofore made wherein the clipping-blade was caused to operate when the cigar end is forced in the cigar-receiving opening and the plate having the opening is forced downward. My device differs from this in that a figure is provided which, being pivotally arranged in a base, operates when the cigar end is forced into the mouth of the figure to move backward, and thus cause the cutting-knife to be projected across the cigar-opening and the cigar end to be cut off. My device differs also from the kind heretofore made in the detail of construction, arrangement, and operation, as hereinafter specifically pointed out.

The object of my invention is to make an ornamental, cheaply and simply constructed, and convenient easily operative device; and to that end my invention consists in the construction and arrangement as herein set forth, whereby the beneficial objects of my invention are attained.

In the accompanying drawings, in which like letters of reference indicate like parts, Figure 1 is a perspective view of my complete device, and Fig. 2 is a side elevation of the same in section.

Referring to the drawings in detail, *a* indicates a base or frame; *b*, a figure having a pivotal lug, *c*, which is pivoted to lugs or parts *d*.

e indicates a spring having a knife or cutting edge at its upper or free end, and is secured by a screw to the boss *b'*.

g indicates a cigar in position before the device is operated to clip or cut the tip from the cigar.

The portion of the figure representing the mouth is provided with an opening, as shown, of sufficient size to receive the cigar-tip, and the cutting-edge is adapted to cover this opening and slide close to it when the figure is thrust backward.

To use the device it simply becomes necessary to place the end of the cigar in the dicated in dotted lines in Fig. 2, when the blade will be forced across the opening and the end of the cigar will be cut off and fall through the figure to the case *a* or to any receptacle provided to receive the cigar ends.

The elevated arms enable me to hang a lamp or support a cigar-lighting torch thereon.

Other forms or figures may of course be used, if desired, and the cutting-blade may be secured in other equivalent ways than that shown.

The spring *e* returns the figure to its normal position when pressure is removed.

I am aware that cigar-tip cutters have heretofore been made consisting of a storage-box having a pivoted lid provided with gage-holes, and having a spring-blade which operates to open the cover and cut the cigar-tip, and I make no claim to such construction. With such device the user must hold the cigar nearly perpendicular while cutting the tip, while with my device the cigar is held nearly horizontal, and my figure, which is pivoted to stand while in its normal position more perpendicularly, is by the act of cutting forced backward to stand at an angle. The figure used by me does not act as a cover to the box, but is pivoted to the box and projects through an opening in the cover.

Having therefore described my invention, what I claim, and desire to secure by Letters Patent, is—

1. A figure, *b*, having an opening to receive a cigar-tip, in combination with a box-base, *a*, having an opening to allow the figure to project therefrom, the figure being pivoted within the box-base, and a cutting spring-blade, *e*, fixed to the base at one end and projecting across the cigar-tip opening at its opposite end, substantially as shown.

2. A base, *a*, having lugs *d*, in combination with a figure-piece, *b*, having tongue *c*, pivoted within said base to said lugs and projecting therefrom, and a spring cutting-blade, *e*, arranged to project upward into the figure and cut across the cigar-receiving opening, substantially as shown.

3. A cigar-tip clipper consisting of a base, *a*, having a figure, *b*, pivoted thereon, said figure having its arms raised to support a cigar-lighting torch, and the spring-cutter *e*, substantially as shown.

Witnesses: TIMOTHY R. SHEA.

ALLEN WEBSTER.

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(No Model.)

R. MacMORRIS.

DETACHABLE MUSTACHE SHIELD OR GUARD FOR CUPS.

No. 516,354. Patented Mar. 13, 1894.

FIG: 1

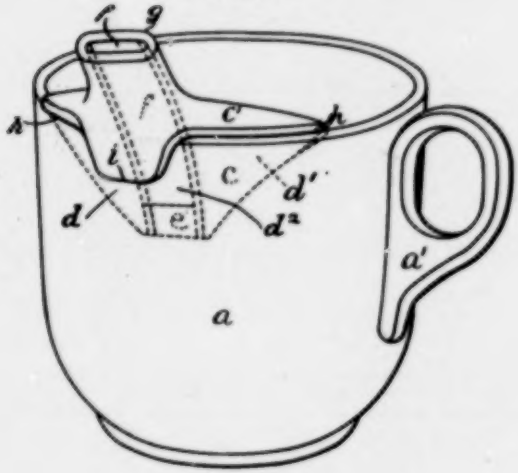


FIG: 2

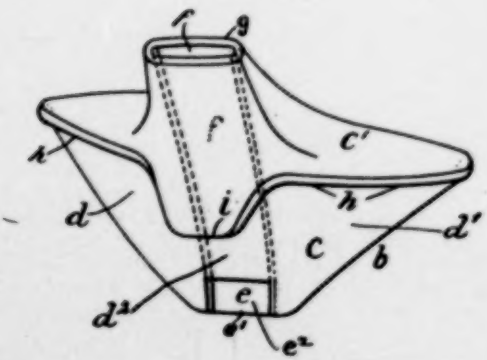
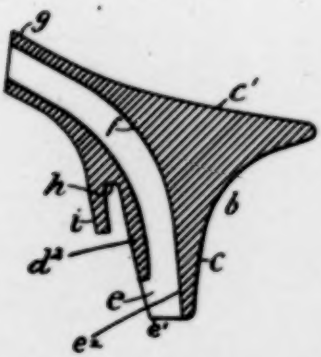


FIG: 3



WITNESSES:
W. Jackson.
W. A. Schaefer.

INVENTOR:
Robert MacMorris.
BY J. Walter Douglass.
ATT'Y

UNITED STATES PATENT OFFICE.

ROBERT MACMORRIS, OF PHILADELPHIA, PENNSYLVANIA.

DETACHABLE MUSTACHE SHIELD OR GUARD FOR CUPS.

SPECIFICATION forming part of Letters Patent No. 516,854, dated March 13, 1894.

Application filed March 6, 1893. Serial No. 464,728. (No model.)

To all whom it may concern:

Be it known that I, ROBERT MACMORRIS, a citizen of the United States, residing at the city of Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented certain new and useful Improvements in Detachable Mustache Shields or Guards for Cups, of which the following is a specification.

My invention relates to a detachable shield or guard for application to cups for protecting the mustache in the imbibing of fluids or liquids therefrom.

The principal objects of my invention are first, to provide a simple, inexpensive and efficient detachable guard or shield for ready application to different styles of cups for protecting the mustache in the imbibing of a liquid or fluid therethrough; and second, to provide a detachable guard or shield for cups for protecting the mustache and permitting of a regulated discharge of the fluid or liquid from the cup into the mouth without the same contacting with the mustache.

My invention consists of the improvements in detachable shields or guards for cups hereinafter described and claimed.

The nature and general features of my invention will be more fully understood from the following description taken in connection with the accompanying drawings forming part hereof, and in which—

Figure 1, is a perspective view of a cup with a detachable shield or guard embodying the general features of my invention shown in application thereto. Fig. 2, is a similar view of a detachable device removed from the cup; and Fig. 3, is a vertical central section through the device of Fig. 2.

Referring to the drawings *a*, is a cup of any suitable shape or form provided with an ordinary handle *a'*.

b, is the detachable shield or guard having a truncated or similar shaped body *c*, and having the front portion of the body convexly curved at *d* and *d'*, and at the middle of the front portion of the body *c*, as at d^2, the same is arranged so as to fit snugly up against the inner surface of the cup *a*, for purposes to be presently fully explained.

In an inlet located near the bottom of the body *c*, and arranged as that in the application of the shield or guard to the cup *a*, the face of the inlet *e*, will occupy a position flush with the internal wall of the cup and in such position a narrow space *e'*, will be provided at the base portion of the device between the internal surface of the cup and the internal surface e^2, of the shield or guard through which space the fluid of the cup is lifted by suction through the body *c*, of the device to be presently more fully explained. This outlet *e*, merges with a curved conduit *f*, provided with a flaring teat or spout *g*, for discharging in regulated quantity the fluid contents of the cup *a*, into the mouth. The conduit *f*, by reason of the curved construction thereof as clearly shown in Fig. 3, is in fact an air channel, which when the device is in use with the cup containing its full quota of fluid permits of the requisite normal suction being obtained and maintained to cause an efficient lifting of the fluid through the narrow slit or opening *e'*, in the base of the device. Moreover, the flow of the fluid is at all times while the shield or guard is in use under due regulation, so that at no time can the mouth be flooded through the lifting by suction of the contents of the cup, which would occur if a strainer was employed in the base portion of the device, because of the area of open space which such would present and thereby interfering with the lifting by suction and at the same time requiring abnormal suction and as a consequence flooding of the mouth with the fluid of the cup *a*. The upper or face portion *c'*, of the body *c*, is provided with an overhanging flange *h*, forming a channeled seat for engaging the device with the edge or rim of the cup *a*, and provided with an integral depending lip or tongue *i*, for engaging the exterior surface of the cup and supporting the device in position in connection therewith.

The hereinabove described detachable device having been caused to assume the position in connection with the cup as illustrated in Fig. 1, with the first and second fingers resting on the face *c'*, of the body *c*, and with the thumb and other fingers embracing the cup, the contents of the cup in regulated quantity may be readily withdrawn there-

into the mouth, without the mustache being soiled or in fact coming in contact with the fluid or liquid of the cup withdrawn therefrom.

Having thus described the nature and objects of my invention, what I claim as new, and desire to secure by Letters Patent, is—

The detachable mustache shield or guard for drinking cups or vessels, comprising an imperforate truncated body *c*, having a convexly curved front at *d* and *d'*, with the middle portion d^3, adapted to snugly engage the wall of a drinking vessel, an inlet *e* located near the bottom of the device and adapted to occupy a position flush with the internal wall of the vessel so as to leave a narrow space *e'*, at the base and between the internal wall of the cup or vessel and surface of the device and through which narrow space *e'*, the liquid is adapted to be lifted by suction in regulated volume or prescribed quantity through the curved conduit *f*, extending the length of the device and having at the extremity thereof a flaring teat *g*, the upper portion *c'*, of said body *c*, of the device being provided with an overhanging flange *h*, which is recessed so as to be adapted to seat with the top edge of the vessel and provided with a depending lip *i*, adapted to maintain the device in required position with respect to the vessel, all arranged as shown and for the purposes described.

In testimony whereof I have hereunto set my signature in the presence of two subscribing witnesses.

ROBT. MACMORRIS.

Witnesses:
THOMAS M. SMITH,
RICHARD C. MAXWELL.

No. 843,024. PATENTED FEB. 5, 1907.

T. J. LIVINGSTON.

FIGURE TOY.

APPLICATION FILED NOV. 20, 1906.

Fig. 1.

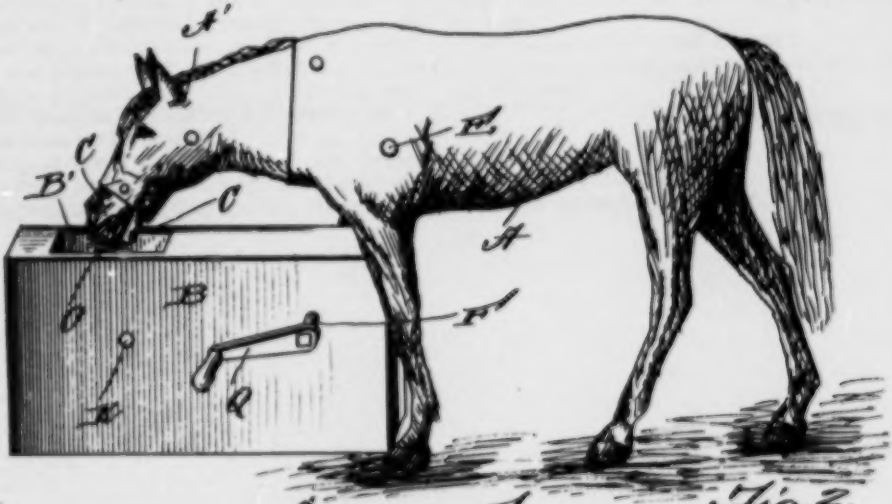
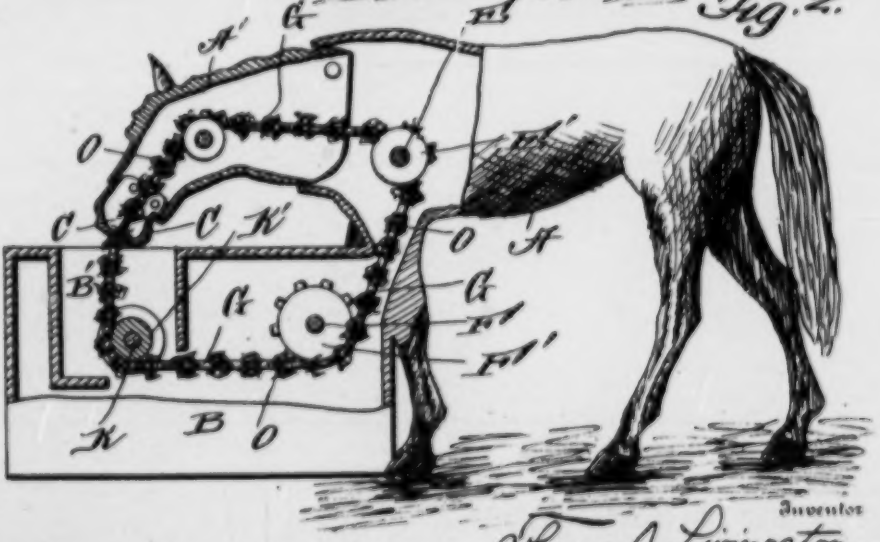


Fig. 2.



Witnesses

R. A. Brown.

L. A. Sherman

Inventor

Thomas J. Livingston,

By Franklin H. Hough

Attorney

UNITED STATES PATENT OFFICE.

THOMAS JOHN LIVINGSTON, OF FITZGERALD, GEORGIA.

FIGURE TOY.

No. 843,024. Specification of Letters Patent. Patented Feb. 5, 1907.

Application filed November 20, 1906. Serial No. 344,289.

To all whom it may concern:

Be it known that I, THOMAS JOHN LIVINGSTON, a citizen of the United States, residing at Fitzgerald, in the county of Irwin and State of Georgia, have invented a certain new and useful Improvement in Figure Toy; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters and figures of reference marked thereon, which form a part of this specification.

This invention relates to new and useful improvements in figured toys; and the object of the invention is to produce a simple and efficient device of this nature consisting of a continuously-feeding apparatus comprising an endless carrier to which bunches indicating food are attached and adapted to be carried into the mouth of the animal, the lips and head of the figure being pivotally mounted in order to give the appearance of the natural movements of the lips and head while eating.

The invention comprises various other details of construction and combinations and arrangements of parts, which will be hereinafter fully described and then specifically defined in the appended claim.

I illustrate my invention in the accompanying drawings, in which—

Figure 1 is a perspective view of the animal, showing the feeding trough or stall out of which the food passes into the mouth of the animal; and Fig. 2 is a vertical sectional view through the animal and the feed-stall.

Reference now being had to the details of the drawings by letter, A designates the body of an animal, which in the drawings is made to represent that of a horse, although it will be understood that the apparatus may be applied to any kind of an animal.

B is a feed-stall having an opening B′, through which the feed passes from the feed stall or box into the mouth of the animal.

The head A′ of the animal is pivotally mounted in order to have a swinging movement, and also the lips C are pivoted and adapted to be moved by the bunches of food which enter the mouth and serve to give a life-like movement to the parts.

Fixed to a shaft E, journaled in the side walls of the body of the animal, is a drum E′, and F is a shaft journaled in suitable bearings in said feed stall or box.

F′ is a sprocket-wheel fixed to said shaft F, and G is an endless band having perforations therein adapted to engage the teeth of said sprocket-wheel, and K designates a shaft also mounted in the side walls of the feed stall or box and to which a drum K′ is fixed. Said band G has bunches of artificial food O secured thereto its entire length and passes through between the lips of the animal and over the drum and thence down through an opening in the bottom of the body and into the rear end of the box, thereby concealing the exit movement of the food back into the box, the bunches of food only being visible as they pass into the mouth of the animal and, coming in contact with the pivotal lips, cause the same to tilt and also the head, thereby giving a natural life-like appearance to the animal as though eating. A crank or handle Q is fastened to the shaft F, whereby the latter may be rotated and the band made to travel.

While I have described the device as operated by means of a hand-crank, it will at once be evident that clockwork mechanism or any other suitable source of power may be substituted therefor.

What I claim is—

A figure toy consisting of a body portion of an animal, a pivotal head thereon, pivotal lips upon said head, a drum mounted therein, a feed-box having an opening in its top, a shaft mounted in the side walls of the box, a sprocket-wheel fixed to said shaft, a drum also mounted between the walls of the box, an endless band passing over said drums and sprocket-wheel, and bunches representing artificial food fastened to the band and adapted to move said pivotal lips of the animal as they pass into the mouth of the latter, as set forth.

In testimony whereof I hereunto affix my signature in the presence of two witnesses.

THOMAS JOHN LIVINGSTON.

Witnesses:
J. L. GOOGE,
J. W. RODWELL.

March 25, 1930. B. B. TROSPER 1,751,773

TOY FIGURE

Filed April 12, 1928

Fig. 8.

Fig. 1.

Fig. 2.

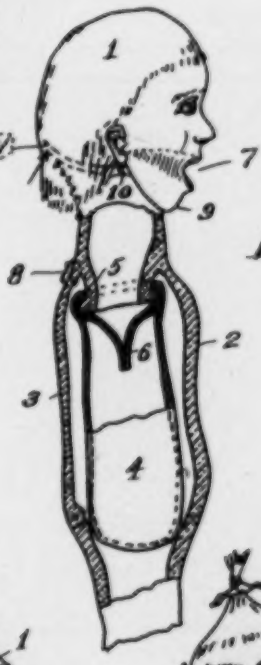


Fig. 3.

Fig. 5.

Fig. 7.

Fig. 4.

Fig. 6.

INVENTOR

Bal Bill Trosper.

BY

H. M. Plaistead.

ATTORNEY.

Patented Mar. 25, 1930

1,751,773

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UNITED STATES PATENT OFFICE

BAB BELL TROSPER, OF NEAR MONROE CITY, MISSOURI

TOY FIGURE

Application filed April 18, 1928. Serial No. 269,343.

This invention relates to certain new and useful improvements in dolls and like figures of animals, birds, etc., the peculiarities of which will hereinafter be fully described and claimed.

The main object of my invention is to adapt such a toy figure to open its mouth by manipulation to receive and retain food in an inner chamber adapted for emptying, whereby a child may simulate feeding her doll or other figure; secondly, to effect such action of the figure by manipulation of the ears as operating levers; thirdly, to simulate sticking out the tongue at the same time the mouth is opened; and fourthly, to provide flexible cheeks in said figure.

Many dolls are adapted to open the mouth, but the construction is often such that the action is a travesty on nature and repugnant to a child. In figures representing animals with deeply slit jaws and birds with long bills, the appearance is more similar to natural action and I provide an interior chamber with a valve adapted to admit food as fed to the figure by the child and retain such contents till it is necessary to empty the chamber, thus furnishing amusing occupation for the little one. Also, simultaneous action of projecting the tongue when the mouth is opened adds to the natural appearance and is so recognized by the child; and manipulation of the ears to effect said action promotes the amusement of the child operator.

In the accompanying drawing in which like reference numerals indicate corresponding parts,

Fig. 1 represents a side view of a doll with my improvements applied thereto;

Fig. 2, a partial vertical section of Fig. 1;

Fig. 3, the head of such a doll with bulging cheeks;

Fig. 4, a horizontal section through the mouth of Fig. 3 and plan view of operating mechanism;

Fig. 5, a head similar to Fig. 3 showing the mouth open and tongue projecting;

Fig. 6, a sectional plan view similar to Fig. 4 showing the mechanism in position for producing the appearance of Fig. 5;

Fig. 7, a figure representing a bird such as a cormorant exemplifying my invention; and

Fig. 8, a portion of a figure representing a dog adapted to illustrate my invention.

Referring to the drawing, the numeral 1 designates the head of a doll having a hollow body 2 and a hinged lid 3 for an opening in the back or elsewhere to allow the removal of a sac 4 of rubber or other suitable material adapted to be detachably secured to a neck extension 5, and having a self-closing flap or other check valve 6 guarding the top of the sac to avoid accidental discharge of food delivered thereto through the open mouth 7 by the child operator. With suitable check valve for this sac or other interior chamber, water, milk and other liquids are retained in said sac till the sac is removed through said opening in the back for emptying. The lid is held closed by a button 8 or otherwise.

The doll may be of porcelain clay, papier mâché, or other material, but the sides of the face forming the cheeks are made of flexible and/or elastic sheet material to allow of depressing the jaw 9 on its pivot 10 by a loop lever 11 fixed to the jaw and extending back of the neck where it is practically concealed by the usual hair. By pressing upward on the lever as indicated by the arrow Fig. 2, the mouth is opened as indicated by this figure for admission of food to the interior sac. A spring 12 may be used to assist in keeping the jaw raised to normal closed position. Figs. 3–6 also have a pivoted jaw, and preferably have an interior sac with check valve as shown in Fig. 2.

In Fig. 4 the flexible cheeks of the figure are bulged outward by the arms of the suitably shaped spring 13 secured at its middle to the back of the mouth and its free arms bent to the desired contour of the cheeks as bulged outward, and having a lateral spring tendency outward, which thus act to distend the cheeks and stretch the lips horizontally with the chin raised accordingly as indicated in Figs. 3 and 4.

Each arm of said spring has an outward projection 14 rigidly or otherwise connected to the spring, and passing through adjacent openings back of the ears and are preferably

pivoted by their ends to the ears themselves. The ears are pivoted at 15 or otherwise movable, so that the outward tendency of the spring arms tends to make the ears stand outward from the head as shown in Fig. 4. Pressure on the ears by finger and thumb as indicated in Fig. 6, will cause them to lie close to the head and act as levers on said spring projections 14 to force them inward, compress the spring arms 13 and allow the jaw to drop and be automatically depressed by a weaker spring 16 mounted on the rigid neck and so collapse the cheeks, distended in Figs. 3 and 4, and open the mouth as shown in Fig. 5 similar to Fig. 2.

The coil spring 16 has one arm bearing down on the jaw under the tongue and another arm that is fixed in the throat. The lateral spring tendency of the spring arms 13 distends the flexible cheeks (Fig. 3) and raises the jaw by overcoming gravity and the downward pressure of the weaker spring 16. The latter spring simply adds to the gravitating tendency of the jaw when the spring arms 13 are compressed and release the outward pressure on the cheeks, as shown in Fig. 6.

In order to project the tongue 17 simultaneously with the opening of the mouth by depressing the jaw, the tongue is mounted on an inner spring 18 secured to the inner side of the spring 13 and forming with the middle back portion of said spring 13 or otherwise, a circular loop in normal position that becomes elliptical when laterally compressed and carries the tongue outward as shown in Fig. 6. Since the back end of the spring is fixed at the back of the mouth, compression to an elongated or elliptical form (Fig. 6) causes the front end carrying the tongue to move forward and protrude the tongue simultaneously with the depression of the jaw by the weaker spring 16, and consequent opening of the mouth. When the ear levers are released both parts of this compound spring tend to assume their circular position, and the tongue is retracted and the cheeks are distended again. (Fig. 4.) Protection of the tongue alternates with bulging of the cheeks.

The lower bill of the cormorant Fig. 7 is depressed by manipulating a backward loop 19 (similar to 11 in Figs. 1 and 2) against the normal tendency of a spring 20 to raise the bill.

The pivotal ears of the dog Fig. 8, have links 21 connecting rearward extensions 22 of the jaw with the ear levers. By passing the hand of the operator over the ears and depressing them—as if smoothing the head,—the ears will lie down and the mouth will open.

In all the toy figures, the jaw is pivoted at 10. Closing the mouth is effected by the elastic cheeks in Figs. 1 to 6, assisted by coil spring 12 in Figs. 1–2 that pulls down on the lever 11 fixed to the jaw; or by the flat spring 20 in Fig. 7 that pushes down on the corresponding lever 19. In Fig. 8, the flat spring 12 pushes up on the dog's jaw to close it after the ear levers have opened it as shown.

The pivoted lower jaw is depressed and the mouth opened by manipulating the loop lever upward in Fig. 2; by manipulating the pivoted lever ears backward as indicated in Fig. 6; and by manipulating the pivoted lever ears downward in Fig. 8: thus providing manually actuated levers in each case for opening the mouth of the toy figure when the child operator desires.

An interiorly disposed sac as in Fig. 2 is provided for cormorant and dog, (Figs. 7 and 8) respectively.

Other manually operated means than those illustrated may be used without departing from the spirit of my invention.

I claim:

1. A toy figure of the character described comprising a jaw manually operable to form an open mouth, and a body having walls forming an interior chamber adapted to receive its contents through the mouth, and provided with a check valve having self-closing flaps opening inward and preventing discharge of the contents through the mouth.

2. A toy figure of the character described comprising a jaw manually operable to form an open mouth, a hollow body, and an interiorly disposed sac detachably connected to the mouth and removable with its contents through an opening in said body.

3. A toy figure of the character described comprising a jaw manually operable to form an open mouth, a hollow body, and an interiorly disposed sac connected to the mouth and provided with a check valve, substantially as described.

4. A toy figure of the character described comprising a pivoted jaw with flexible cheeks, spring means located inside said jaw adapted to bulge said cheeks, and movable ears operatively connected to said spring means, substantially as described.

5. A toy figure of the character described comprising a pivoted jaw, means to depress the jaw to open the mouth, a circular spring located within said jaw, a tongue mounted on said spring, and means to compress said spring laterally simultaneously with the opening of the mouth.

6. A toy figure of the character described comprising a pivoted jaw, means to depress the jaw to open the mouth, a circular spring disposed within said jaw and secured in the rear, a tongue mounted on the front of said spring, and pivoted ears operatively connected to the sides of said spring adapted to compress it laterally to elliptical shape and project the tongue, substantially as described.

7. A toy figure of the character described comprising a pivoted jaw, means to depress said jaw, a circular spring disposed within

said jaw and having outward projections through openings back of the ears, and a tongue mounted on said spring adapted to be projected when the jaw is depressed, substantially as described.

8. A toy figure of the character described comprising a pivoted jaw with flexible cheeks, a compound spring fastened at the rear within said jaw and having arms with free ends and lateral tendency and a circular portion between said arms, a tongue mounted on said circular portion, and pivoted ears operatively connected to said spring, substantially as and for the purpose described.

In testimony whereof I have affixed my signature.

BAB BELL TROSPER.

158

Feb. 10, 1931. A. A. THEODOROPULOS 1,792,129

COMBINED UMBRELLA HOLDER AND PURSE

Filed Nov. 2, 1929

FIG. 1

FIG. 3

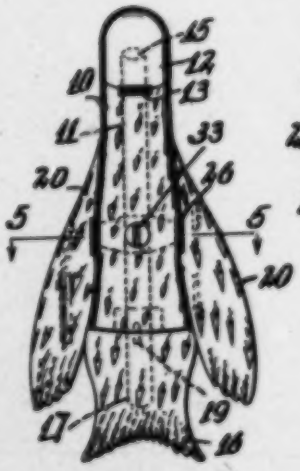

FIG. 2

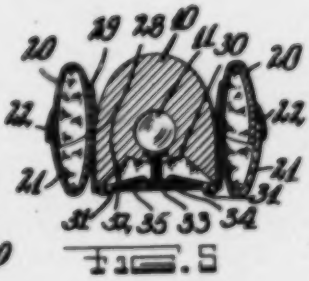

FIG. 5

FIG. 4

FIG. 6

INVENTOR
Aristede A. Theodoropulos
BY
ATTORNEY

Patented Feb. 10, 1931

1,792,129

159

UNITED STATES PATENT OFFICE

ARISTEDE A. THEODOROPULOS, OF NEW YORK, N. Y.

COMBINED UMBRELLA HOLDER AND PURSE

Application filed November 3, 1930. Serial No. 494,982.

This invention relates to new and useful improvements in casings for holding umbrellas.

The invention has for an object the provision of a device of the class mentioned which is of simple durable construction, dependable in use and efficient in action, and which may be manufactured and sold at a reasonable cost.

The invention proposes an umbrella casing simulating a bird, preferably an eagle, and having a hollow body, a head hinged upon the body arranged for being latched in ordinary condition and to hinge for permitting the insertion of an umbrella within the hollow, a tail detachably mounted upon the body and also permitting the insertion of an umbrella within the hollow, the wings constituting pocket books. Articles such as powder case, a lipstick holder, a handkerchief, etc., may be carried in the pocket books. A means may be provided for fixing the wings in various spread positions.

For further comprehension of the invention, and of the objects and advantages thereof, reference will be had to the following description and accompanying drawings, and to the appended claims in which the various novel features of the invention are more particularly set forth.

In the accompanying drawing forming a material part of this disclosure:—

Fig. 1 is a side elevational view of a device constructed according to this invention.

Fig. 2 is a rear elevational view of Fig. 1.

Fig. 3 is a view similar to Fig. 1 but showing the head moved to an open position.

Fig. 4 is a vertical sectional view of the tail, per se.

Fig. 5 is a horizontal sectional view taken on the lines 5—5 of Fig. 2.

Fig. 6 is a view similar to Fig. 5 but showing the wings in spread positions.

The reference numeral 10 indicates generally a body having a bore 11 and of eagle shape and design. A head 12 is hinged to the body at 13 and is provided with a latch 14 arranged for latching the head in a natural position on the body. The head is provided with a hollow 15 communicating with the hollow of the body. A tail 16 is detachably mounted upon the bottom of the body.

The tail 16 is provided with a bore 17 aligning with the bore of the body 10 and is provided with a reduced top end 18 arranged for engaging in a recess in the body for firmly maintaining its position. A latch 19 serves to lock the tail upon the body. Wings 20 on opposite sides of the body 10 are arranged to constitute pocket books.

The pocket book construction is of any customary design preferably having a flap 21 arranged to be latched in a closed position by a latch 22. Various articles are shown stored within the pocket book such as a powder case 23, a handkerchief 24, a comb 25, etc. The wings are hingedly connected at their top edges on the body as at 26. Fringes 27 attached upon the body 10 simulate the feet of the bird.

A bell crank 28 is pivotally mounted upon each of the hinges serving to hold the wings 20. One of the arms of each hinge is attached upon the rear face of the wing, this arm being indicated on the drawing by reference numeral 29. The other arm 31 extends within a hollow 30 formed in the body and is provided with a slot 32. A screw 33 is rotatively mounted in the body 10 and a shuttle 34 threadedly engages upon the screw and is disposed within the hollow 30. The head of the screw is accessible from the exterior so as to be manually operable for causing the shuttle 34 to move along its length. Each of the ends of the shuttle is provided with a pin 35 engaging in the slots 32 in the arms 31. When the screw is turned for moving the shuttle, this motion is communicated for moving the wings to a different spread position.

In operation of the device an umbrella of collapsible construction, as disclosed in my copending application, Serial No. 276,206 filed May 9, 1928, Patent No. 1,738,267 of Dec. 3, 1929 for collapsible umbrella, may be inserted within the hollow body by either moving the head 12 to a position illustrated in Fig. 3 or by disengaging the latch 19 and removing the tail. Various articles may be held in the pocket books and these pocket books may be positioned in various angular

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conditions for convenience in holding articles and for simulating different spread conditions of the wings of the bird.

While I have shown and described the preferred embodiment of my invention, it is to be understood that I do not limit myself to the precise construction herein disclosed and the right is reserved to all changes and modifications coming within the scope of the invention as defined in the appended claims.

Having thus described my invention, what I claim as new, and desire to secure by United States Letters Patent is:—

1. In a device of the class described, a body, pocket books hinged thereon, bell cranks hinged on the body and having one of their arms respectively attached to the pocket books, and a means for holding the bell cranks in fixed positions.

2. In a device of the class described, a body, hinges mounted on the sides of the body and having adjacent inner ends extending into a hollow in the body, and outer ends supporting pocket books, and means for holding the corresponding inner ends of the hinges at spaced distances away from the body.

3. In a device of the class described, a body, hinges mounted on the sides of the body and having adjacent inner ends extending into a hollow in the body, and outer ends supporting pocket books, and means for holding the corresponding inner ends of the hinges at spaced distances away from the body, said means including elongated slots formed in the adjacent inner ends of said hinges, and adjustable means attached between the slots for changing the positions of the inner hinge portions.

4. In a device of the class described, a body, hinges mounted on the sides of the body and having adjacent inner ends extending into a hollow in the body, and outer ends supporting pocket books, and means for holding the corresponding inner ends of the hinges at spaced distances away from the body, said means including elongated slots formed in the adjacent inner ends of said hinges, and adjustable means attached between the slots for changing the positions of the inner hinge portions, comprising a shuttle slidably engaging said slots, and a manipulating screw rotatively mounted on the body and threadedly engaging said shuttle.

In testimony whereof I have affixed my signature.

ARISTEDE A. THEODOROPULOS.

Aug. 22, 1939. E. P. SMITH 2,170,311

BOWL

Filed March 14, 1938

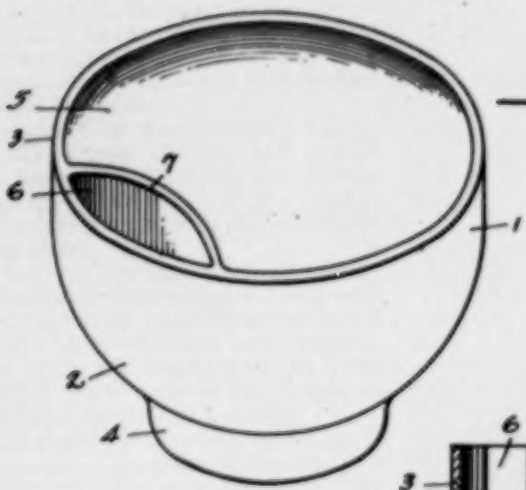

Fig. 1.

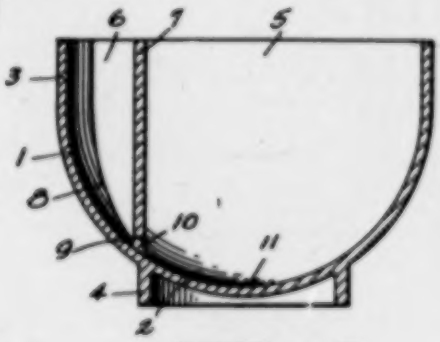

Fig. 3.

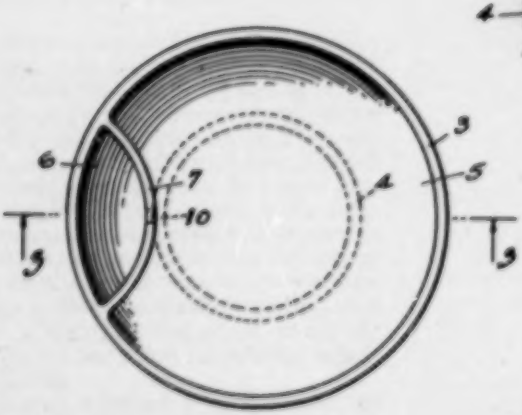

Fig. 2.

INVENTOR.
EDITH PHILLIPS SMITH.
BY Pclapp & Cle.
ATTORNEYS.

UNITED STATES PATENT OFFICE

2,170,311

BOWL

Edith Phillips Smith, Berkeley, Calif.

Application March 14, 1938, Serial No. 195,739

1 Claim. (Cl. 65—15)

The present invention relates to improvements in breakfast bowls and its principal object is to provide a breakfast bowl which permits cream to be introduced into breakfast foods without destroying their crispness, a characteristic which makes certain kinds of breakfast foods particularly appetizing.

At present it is the custom to serve certain breakfast foods in conventional bowls and to pour the cream or other liquid to be used on top of the breakfast food so that the cream trickles through the food, which causes the latter to absorb the cream and to become soggy.

In the present invention it is proposed to provide a bowl which is arranged in such a manner that the cream may be directly delivered to the bottom of the bowl without trickling through the breakfast food so that the latter retains its crispness. The user may dip his spoon down to the level of the cream and in lifting it will remove a spoon partly filled with cream and with a layer of dry and crisp breakfast food on top of the cream.

Further and other objects and advantages of my invention will appear as the specification proceeds.

The preferred form of my invention is illustrated in the accompanying drawing in which

Figure 1 shows a perspective view of my breakfast bowl,

Figure 2 a top plan view of the same, and

Figure 3 a vertical section taken along line 3—3 of Figure 2.

While I have shown only the preferred form of my invention I wish to have it understood that various changes or modifications may be made within the scope of the claim hereto attached without departing from the spirit of the invention.

In its preferred form my bowl 1 has a rounded, concave bottom 2 which may be semi-spherical in form and has a rim 3 rising therefrom which latter is preferably cylindrical.

It should be understood that this form of bowl is more or less conventional and other forms may be substituted as long as they lend themselves to the application of the special features about to be described.

A cylindrical base 4 may be used to normally hold the bowl in upright position.

The bowl is divided into a major section 5 and a minor section 6 by means of a partition 7. The latter rises vertically from the ascending bottom of the bowl in the proximity of a portion of the rim of the bowl so as to separate the section or pocket 6 from the main body portion of the bowl.

In horizontal section the partition is reversely concave to that portion of the rim with which it cooperates in forming the pocket and the partition rises from the bottom at a point well spaced from the center of the bowl, as shown in the drawing.

Since the partition is vertical and the cooperating wall section of the bowl is curved, the bowl and the wall section intersect along a curved line 8, and the pocket formed is deepest at a point immediately adjacent the center of the partition, with the result that all parts of the pocket drain toward said point, which is indicated at 9.

At this point 9 the partition 7 is formed with an aperture 10 and since this aperture is still a considerable distance above the central bottom point 11 of the bowl, any liquid draining through the hole will gravitate toward the center of the bowl.

The manner of using my invention will be readily understood from the foregoing description. The crisp breakfast food is poured, usually from a commercial container, into the main compartment of the bowl.

The user then empties the cream into the pocket or minor compartment 6 and the latter drains completely from the pocket into the lower section of the bowl, entirely out of contact with the main part of the breakfast food.

The user may now dip his spoon into the bowl sufficiently deep to secure a portion of the cream and in lifting the spoon will remove a desired amount of the breakfast food which thus remains crisp until it reaches the mouth of the user.

The size of the aperture 10 should preferably be such that it somewhat retards the flow of the cream so that the latter would be fed into the bottom of the main compartment slowly and substantially in timed relation to the emptying of the bowl.

I claim:

A bowl of the character described having an annular rim section and a rounded bottom section merging thereinto and a vertical partition near a portion of the rim section and formed on a curve reverse to that of the bowl so as to form a special compartment, each part of which drains toward a central point, the partition having a hole at said point communicating with the main portion of the bowl.

EDITH PHILLIPS SMITH.

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May 14, 1940. L. J. L'HEUREUX 2,200,696

CHILD'S COAXER DISH

Filed Oct. 11, 1938

Fig. 1.

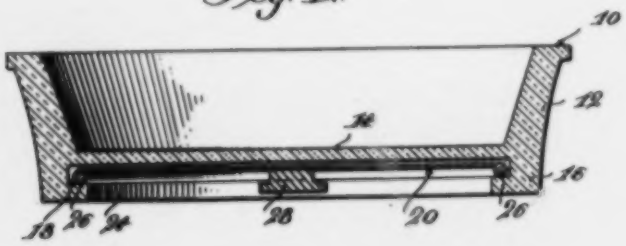


Fig. 2.

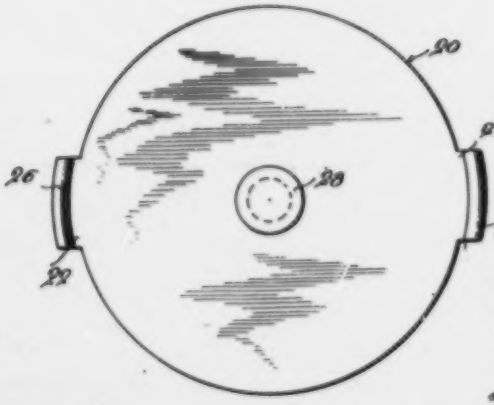


Fig. 3.

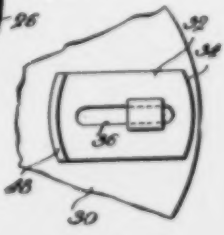


Fig. 5.

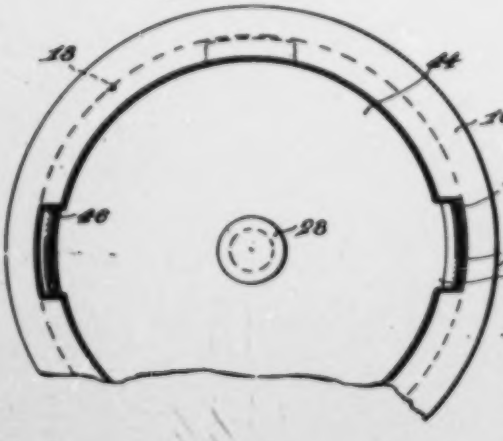
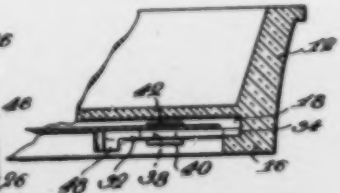


Fig. 4.



Luke J. L'Heureux
INVENTOR

By Victor J. Evans & Co.
ATTORNEYS

UNITED STATES PATENT OFFICE

2,200,696

CHILD'S COAXER DISH

Lake J. L'Heureux, Jasper, Ala.

Application October 11, 1938, Serial No. 234,457

2 Claims. (Cl. 65—15)

My invention relates to dishes such as bowls, saucers or plates, and has among its objects and advantages the provision of an improved child's coaxer dish.

An object of my invention is to provide a dish designed to stimulate a child's interest in eating by providing his favorite comics, nursery rhymes, etc., in the bottom of the dish and which cannot be seen until his cereal or other foods are completely eaten. More specifically, the dish embodies a transparent bottom in combination with a base structure embodying means facilitating the mounting and substitution of inserts in the nature of comics, nursery rhymes, pictures, etc.

In the accompanying drawing:

Figure 1 is a vertical sectional view of a dish embodying my invention;

Figure 2 is a plan view of the insert holder;

Figure 3 is a fragmentary view of a modified form of insert;

Figure 4 is a sectional view of a portion of a dish illustrating the manner in which the insert holder of Figure 3 is associated therewith; and

Figure 5 is a fragmentary bottom plan view of a dish embodying a different form of insert holder.

In the embodiment selected to illustrate my invention, I make use of a dish 10 which includes a side wall 12 and a transparent bottom 14. Side 12 is extended below the bottom 14 to provide a flange 16 which constitutes a base for the dish as well as means for mounting the inserts. Dish 10 may be formed of any suitable material so long as the bottom 14 is of transparent properties. Figure 1 illustrates a dish in the nature of a bowl of circular configuration, although the shape may be varied considerably.

I provide the flange 16 with an internal groove 18 adjacent the bottom 14. Groove 18 supports an insert mount 20. According to Figure 2, insert mount 20 is of circular shape and includes two diametrically opposed tongues 22. As illustrated in Figure 1, the insert mount comprises relatively thin material. I shape the mount of such diameter as to pass easily through the opening 24 defined by the flange 16, but the tongues 22 extend beyond the periphery of the mount so as to position their ends in quite snug relation with the vertical wall of the groove 18. Each tongue is fashioned to provide a bead 26, which beads are receivable within the recess 18 and support the mount 20 in close relation with the bottom face of the bottom 14.

I prefer to employ flexible material for the insert mount, such as Celluloid or other equivalent material. Centrally of the mount I secure a knob 28 which facilitates manipulation of the mount. There is sufficient space between the upper face of the insert mount 20 and the bottom face of the bottom 14 for the reception of inserts in the nature of paper slips printed with comics, nursery rhymes, pictures, etc. The insert mount may be flexed for bringing the tongues 22 into receiving relation with the groove 18. Flexing and manipulation of the mount is facilitated through the medium of the knob 28. Thus the mount may be flexed for positioning the tongues 22 in alignment with the groove 18 after which the mount will flatten and project the tongues into the groove. Disconnection is made by merely exerting a pull on the knob 28.

Figures 3 and 4 illustrate a fragmentary portion of the dish of Figure 1 in combination with a differently constructed insert mount. The plate or insert mount 30 is devoid of the integrally connected ears 22, but is provided with two latch plates 32 located at diametrically opposite points. Since both latch plates are identical in construction and operation, the description will be confined to one. The latch plate 32 illustrated includes a curved end 34 which may be retracted to a position within the peripheral contour of the plate 30, as in Figure 3, or projected beyond the peripheral contour, as illustrated in Figure 4. The plate is provided with a longitudinal slot 36 which loosely receives a flat pin 38 shaped to restrain the plate from relative rotary movement. The pin 38 includes a head 40 which holds the plate in frictional relation with the mount 30, while the pin is extended through an opening in the mount and rivsted, as at 42. Thus the plate may be shifted outwardly and inwardly. Figure 4 illustrates the mount 30 connected with the dish, at which time the latch plates 32 are projected into the groove 18.

Figure 5 illustrates a slightly different form of insert mount. The mount or plate 44 may be identical with that disclosed in Figure 2, while the flange 16 is recessed at 46 to provide accommodation for the tongues 22. In this construction, the insert mount 44 is rotated to position the tongues 22 in registration with the grooves or recesses 46 to permit the mount to be pushed home. As the mount is pushed home, the mount is rotated for bringing the tongues 22 out of registration with the recesses 46, as indicated in dotted lines in Figure 5. Similarly, the mount 44 is disconnected by merely rotating the same for bringing the ears into registration with the recesses.

168 In all the forms described, the dish embodies an insert mount which is easily removed or placed in position. The inserts may take various forms such as paper clippings in the nature of comics, nursery rhymes and pictures of interest to the children. The inserts are incorporated in the bottom of the dish and cannot be seen until the cereal or other foods are completely eaten. The pictures are easily changed to maintain the interest of the child, and by rousing the child's curiosity as to what lies underneath, he will soon make a game of his eating.

Without further elaboration, the foregoing will so fully illustrate my invention that others may, by applying current knowledge, readily adapt the same for use under various conditions of service.

I claim:

1. A dish of the type described comprising a receptacle unit having a transparent bottom, a grooved flange projecting below the bottom, a mount in the nature of a plate, means cooperable on the mount and in said groove for holding the mount in connected relation with the flange, said mount being spaced from the bottom to house a sheet-like insert, and a knob depending from the mount, said flange being of such depth as to house the mount and constituting a base for the dish.

2. A dish of the type described comprising a receptacle unit having a transparent bottom, a flange projecting below the bottom, the inner face of said flange being provided with a groove and recesses communicating with the groove and intersecting the bottom edge of the flange, a mount shaped to pass inside the flange and having tongues arranged to pass through said recesses, said mount being rotatable for positioning the tongues out of registration with said recesses for connecting the mount with the flange.

3. A dish of the type described comprising a receptacle unit having a grooved flange projecting below the bottom, a mount in the nature of a plate, latch means slidably related to the mount and arranged to be projected into said groove for connecting the mount with the flange, and a knob depending from said mount, said flange being of sufficient depth to house the knob and constituting a base for the dish.

LUKE J. L'HEUREUX.

170

July 9, 1940. I. A. SMITH 2,207,417

CEREAL BOWL

Filed April 18, 1938

Fig. 1

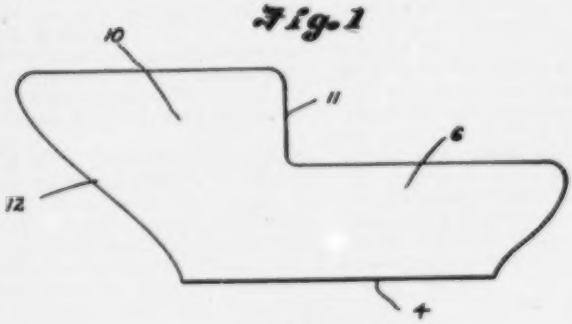


Fig. 2

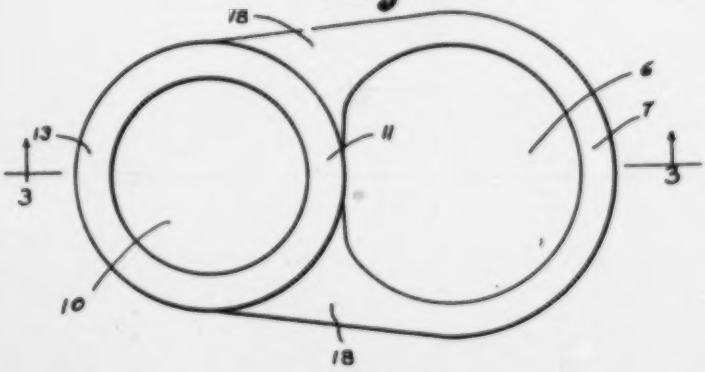


Fig. 3

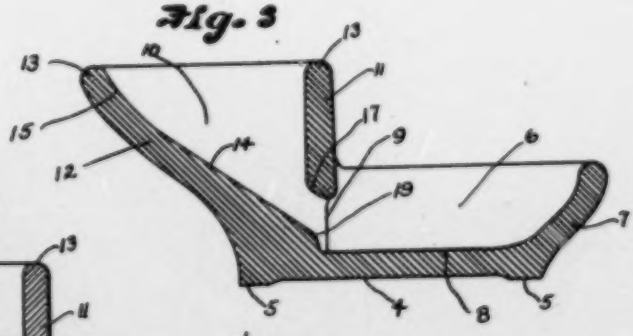
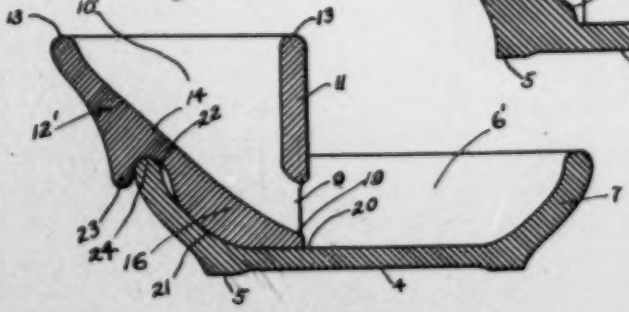


Fig. 4



INVENTOR
Israel A. Smith
BY Alfred R. Fuchs
ATTORNEY

Patented July 9, 1940

2,207,417

171

UNITED STATES PATENT OFFICE

2,207,417

CEREAL BOWL

Israel A. Smith, Independence, Mo.

Application April 18, 1938, Serial No. 202,713

5 Claims. (Cl. 65—15)

My invention relates to cereal bowls, and more particularly to a hopper feed cereal bowl.

It is a purpose of my invention to provide a cereal bowl that comprises a liquid receiving bowl portion and a cereal receiving hopper portion, that are so relatively arranged and located that any dry, loose cereal that may be placed in the hopper portion will be fed into the liquid retaining portion by gravity as the cereal is eaten from the liquid receiving portion of the device, or otherwise moved away from the discharge opening of the hopper. Cereals that are precooked, or otherwise prepared for eating in a dry state, are usually in the form of granules, flakes or other particles, that are readily fed by gravity from a hopper. Such cereals are more palatable and are also more readily digested, if the same are not soaked in the liquid before being eaten. By retaining the crispness of the particles to as great an extent as possible, the cereal has to be chewed more thoroughly than if it is allowed to absorb a large part of the liquid, such as milk or cream, with which it is usually eaten, the chewing, of course, aiding in the digestion of the cereal.

It is an important purpose of my invention to provide a dish that is so made that the liquid, such as cream or milk, can be placed in a bowl portion provided therefor, and the dry, loose cereal in a hopper portion provided for the cereal, and fed from said hopper portion gradually into the liquid holding portion of the dish, so that, as cereal and liquid are removed with a spoon from the bowl portion, the dry cereal will be fed into the liquid receiving bowl portion to replace the cereal so removed. Thus the cereal from the hopper will only be in the liquid in the bowl portion a short period of time.

It is also a purpose of my invention to provide a cereal dish of the above mentioned character, which, due to the movement of the cereal into the liquid receiving portion, will interest a child eating cereal, in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereal by arousing their interest in the process of eating the same.

My improved dish can be made with a hopper portion integral with the liquid receiving portion, or with the hopper portion detachable from the liquid receiving portion. It is an important purpose of my invention to so arrange and construct the bowl and hopper portions, that the same can be readily cleaned and kept sanitary, and, preferably, the hopper portion is spaced laterally from the liquid receiving portion, so that the cereal will enter one side of the liquid receiving bowl from the hopper. The exit from the hopper, or discharge opening, is, preferably, spaced above the bottom of the liquid retaining portion to such an extent that, with the usual amount of cream or milk eaten with cereal of this character, there will be little, if any, liquid entering the hopper portion.

Other objects and advantages of my invention will appear as the description of the drawing proceeds. I desire to have it understood, however, that I do not intend to limit myself to the particular details shown or described, except as defined in the claims.

In the drawing:

Fig. 1 is a view in side elevation of one form of my improved cereal bowl.

Fig. 2 is a top plan view thereof.

Fig. 3 is a vertical sectional view through the same, taken substantially on the line 3—3 of Fig. 2, and

Fig. 4 is a section similar to Fig. 3, of a modified form of the invention.

Referring in detail to the drawing, my improved cereal bowl comprises a body portion having a bottom 4, which may be flat, or substantially so, and may be provided with a slightly projecting rim portion 5, as is customary in bowls or dishes of this character. A bowl portion 6, from which the cereal is to be eaten, is provided, and has an upwardly curving outwardly flaring side wall 7. Said bowl portion is shown as being substantially circular in character, but, of course, can be varied in shape as desired. The bottom 8 of said bowl portion is depressed below an opening 9, provided in one wall of the bowl portion for a purpose to be described below.

Extending upwardly from one side of the bowl portion is a hopper portion 10, which has a wall 11 extending substantially vertically from the bowl portion 6, so as to form a partition between the bowl portion 6 and the hopper portion. The wall portion 11 is curved, being shown as being curved substantially on the surface of a cylinder in the drawing, and merging with an inclined wall 12, the circular rim or lip 13 extending around the top of the hopper portion 12 and the vertical wall portion 11. The inclined wall portion 12 has an inner inclined face 14, having a portion that approaches straightness, between the top and bottom ends thereof, and is concavely curved at 15 near the top end thereof. The bottom edge of the wall 11 adjacent the opening 9 is convexly

curved at 17, so as to offer no resistance to the flow of cereal toward the opening 9. The width of the bottom 4 is, of course, such that there will be no tendency for the dish to tip on the side thereof that is provided with the hopper 10. The hopper portion 10 and bowl portion 6 may be joined in any desired manner, as by means of the web portions 18, so as to provide a dish of smooth contour and without any difficult-to-clean recesses therein.

It will be obvious that, if liquid, such as milk or cream, is placed in the portion 6 of the dish, and dry, loose cereal in the hopper portion 10, the dry, loose cereal will flow from the discharge opening 9 from the hopper into the bowl portion 6, and thus accumulate in a pile near the opening 9 in the liquid in the bowl portion 6. While ordinarily a person would not place any more liquid in the bowl than would reach to the bottom edge 19 of the opening 9, yet if more liquid should be added after cereal has flowed into the bowl portion from the hopper portion, the cereal itself will prevent the liquid from entering the bottom portion of the hopper to any material extent, as dry cereal will continue to flow into the bowl portion as rapidly as it is removed with the spoon. The preferable way of using the bowl is to fill the hopper portion with dry cereal to the extent desired, and then add milk or cream, as desired, in the bowl portion 6.

If desired, the hopper portion can be made separable from the bowl portion to facilitate cleaning of the dish, the bowl portion 6', shown in Fig. 4, being of this character, and having a bottom 4, as previously described, and a concave side wall portion 7, the bowl portion 6' being made substantially in the form of an ordinary circular cereal bowl, such as is commonly used. The hopper portion 10' is detachable from the bowl portion 6' and has a substantially vertical wall portion 11 that merges with the inclined wall 12' in a similar manner to that described in connection with the form of the invention shown in Figs. 1 to 3, inclusive. The wall 12' inclines downwardly in a similar manner to the wall 12, to the discharge opening 9' of the hopper, which is located slightly above the bottom 28 of the bowl portion 6'.

The outer surface of the inclined wall 12' is, preferably, provided with a convex portion 21, that conforms substantially to the curvature of the inner face of the curved side wall 7 of the bowl 6', and has a hook-like formation comprising a concave recess 22 and a projection 23 for engaging over the rim portion 24 of the bowl 6', to detachably mount the hopper portion 10' on the bowl portion 6'. The operation of the device in the form shown in Fig. 4 is substantially the same as described in connection with the form shown in Figs. 1 to 3, inclusive.

What I claim is:

1. In a cereal dish, a wide shallow bowl and a cereal hopper taller than said bowl extending into said bowl, said hopper being located at one side of said bowl and having a steeply inclined bottom wall the lower end of which is disposed adjacent the bottom of said bowl, and a substantially vertical wall separating said hopper from said bowl closed except for an outlet at its lower end adjacent the bottom of said bowl disposed to feed cereal by gravity from the lower end of said inclined bottom wall into said bowl near the bottom thereof.

2. In a cereal dish, a bowl and a cereal hopper extending into said bowl a substantial distance, said hopper having the bottom end thereof disposed adjacent the bottom of said bowl and having an outlet disposed adjacent its bottom end to feed cereal by gravity into said bowl, said hopper having means thereon detachably engaging the rim of said bowl to hold the same in operative position.

3. In a cereal dish, a bowl and a cereal hopper extending into said bowl, said hopper having an inclined bottom wall the lower end of which is disposed above but near the bottom of said bowl, said hopper having an outlet disposed to feed cereal from the lower end of said inclined bottom wall into said bowl near the bottom thereof, said hopper having a rib and groove formation thereon detachably engaging the rim of said bowl to hold the same in operative position.

4. In a cereal dish, a bowl and a cereal hopper extending into said bowl, said hopper having an inclined bottom wall the lower end of which is disposed above but near the bottom of said bowl, said hopper having an outlet disposed to feed cereal from the lower end of said inclined bottom wall into said bowl near the bottom thereof, said hopper having a rib and groove formation thereon detachably engaging the rim of said bowl to hold the same in operative position, the lower end of said hopper engaging the bottom of said bowl.

5. In a cereal dish, a wide shallow liquid receiving bowl having substantially flat bottom, and a cereal hopper taller than said bowl mounted at one side of said bowl and extending into said bowl, said hopper having an upright wall separating said bowl from said hopper, said hopper having a discharge opening below the bottom edge of said wall disposed adjacent the bottom of said bowl but spaced slightly above said bottom, said hopper having a side wall portion extending from near the top thereof downwardly, in converging relation to said upright wall, to said discharge opening at such an inclination as to feed cereal by gravity from said hopper through said opening onto the bottom of said bowl.

ISRAEL A. SMITH.

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Dec. 10, 1940. K. IDE ET AL 2,224,683

FEEDING METHOD AND ARTICLE

Filed April 27, 1938

Fig. 1.

Fig. 2.

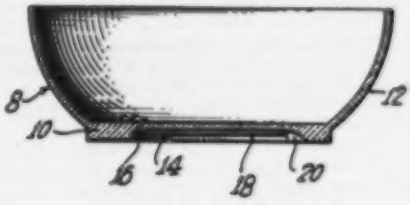
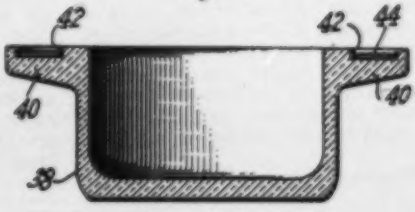


Fig. 3.

Fig. 4.

Fig. 5.

Fig. 6.



INVENTORS
KNOX IDE
BY GEORGE S. HILLS
John M. Lauck
ATTORNEY

UNITED STATES PATENT OFFICE

2,224,683

FEEDING METHOD AND ARTICLE

Knox Ide, Jersey City, N. J., and George S. Hills, New Rochelle, N. Y.

Application April 27, 1938, Serial No. 204,530

2 Claims. (Cl. 65—15)

The present invention relates to a method and article for feeding juveniles. More particularly, it relates to a method of inducing juveniles to partake of nourishment and utensils for containing foods and beverages, such as plates, bowls, cups, and glasses having amusement or educational features associated therewith, for use in carrying out the method.

Nourishment receptacles heretofore used in the feeding of children, when decorated at all, have had the decorations permanently associated therewith, with the result that the child soon becomes familiar with the decoration and loses all interest in it. Also, decorations which are so permanently associated with the utensil become obliterated due to washing and cleaning unless the utensil is made of high-grade china which will take firing sufficiently to insure the permanency of the decoration. This has caused utensils of this type to be prohibitively expensive since such utensils are always subject to breakage on the part of the child.

It is an object of the present invention to provide a method of inducing juveniles to partake of nourishment.

It is a further object of the present invention to provide a decorated container or utensil for foods and beverages.

It is a further object of the invention to provide a decorated container for foods and beverages having educational and amusement features.

It is a further object of the invention to provide a decorated utensil for food or beverages having replaceable educational or amusement features.

It is a further object of the invention to provide an eating or drinking utensil or receptacle having provision for carrying replaceable pictures, prints, etc., and which is sanitary and capable of being easily cleaned and sterilized without injury to the decorative or educational feature.

It is a further object of the invention to provide an eating or drinking receptacle which can be employed with various serial type educational and/or amusement features.

Other objects and advantages, if not specifically pointed out, will be apparent to those skilled in the art upon recourse to the following detailed description of what are now considered the preferred forms of the invention.

In the drawing:

Fig. 1 is a top-plan view of a child's bowl constructed in accordance with the invention;

Fig. 2 is a central vertical cross-sectional view taken substantially on the plane indicated by line 2—2 of Fig. 1;

Fig. 3 is a top-plan view of a modified form of the bowl illustrated in Fig. 1;

Fig. 4 is a top-plan view of another modified form of the invention;

Fig. 5 is a top-plan view of a further modified form of the invention, and

Fig. 6 is a central vertical sectional view taken substantially on the plane indicated by line 6—6 of Fig. 5.

Referring to Figs. 1 and 2, the eating utensil comprises a dished container or bowl 8 which may be formed of glass, natural or synthetic resin, or other moldable plastic or similar material. It is important that the bottom section 10 of the bowl be formed of some translucid, preferably transparent, material in order that articles placed beneath the bottom section 10 will be visible therethrough. The side walls 12 of the bowl may be formed of either transparent or opaque material, as desired, and may be provided with any desired decorative treatment. The shape of the bowl shown in Figs. 1 and 2 is intended merely to provide an example of forms which the bowl may take and the bowl may be given any desired configuration. It is not necessary that the container be made in the shape of a bowl, but it may be formed as a cup, glass, plate, etc.

The bottom section 10 of the bowl is provided, at its underneath portion, with a recess 14 which extends any desired distance into the bottom section. The side wall of the recess is given a slight bevel as shown at 16 for a purpose which will be later described.

A plate 18, which has been shown as a disk but which may be square, oblong or any other desired shape, is made of a size such that when it is gently pressed into the recess 14 it will seat snugly into position and be retained in the recess solely by frictional contact between its periphery and the side-walls of the recess.

The plate 18 may be made of chipboard, fiberboard, Celluloid, metal, wood, or any other desired material which will give it sufficient rigidity to be held in position within the recess by frictional contact substantially without being distorted.

A niche 20 is formed in the side wall of the recess to enable a fingernail or some sharp pointed instrument to be inserted beneath the plate 18 to dislodge it from the recess.

The plate 18 is provided preferably on its top

surface with a figure 22. The figure 22 may be in the form of a picture, print, map or any other desired design. In addition, the print may contain any desired symbol, for example, a letter of the alphabet corresponding to the first letter of the name of the object depicted by the design. In the example given the picture is that of a horse and it also carries the letter H. Throughout the specification and claims the term "design" will be used to denote any of the foregoing enumerated types of design or any other desired design.

The design may be applied to the plate 18 by photolithographic processes, decalcomania processes, off-set printing, hand painting, embossing, engraving or any other of the well-known methods of forming designs.

The modification of the invention illustrated in Fig. 3 differs from that shown in Figs. 1 and 2 in that the recess 14 is supplanted by a slot 24 opening into the base of the utensil or receptacle from the side. The bottom of the slot may be cut out as shown at 26 to facilitate cleaning of the receptacle, but this is not necessary if it is desired that the bottom be solid.

A slide 28, which corresponds to the plate shown in Figs. 1 and 2, is slipped into position from the open side of the slot, and the slide may be provided with any desired design 30 corresponding to the design 22 of the modification shown in Figs. 1 and 2. In the illustrated example the design is a picture of a dog accompanied by the letter D.

The modified form of the utensil illustrated in Fig. 4 differs from that shown in Figs. 1 and 2 in that a recess 32, corresponding to the recess 14, is formed in the top portion of the bottom section of the bowl. A plate 34 bearing a design 37 is snugly seated in position in the recess 32 and retained therein by frictional contact between the periphery of the plate and the side wall of the recess. The side wall of the recess in this modification is also provided with one or more niches 38 to enable the plate 34 to be easily removed. In the example shown in Fig. 4 the design 37 is a picture of a chicken and it is accompanied by the letter C.

The modification illustrated in Figs. 5 and 6 comprises a bowl or other container 38 which may be formed of any desired material and is provided with a flange around its periphery, preferably near the upper portion of the bowl. The flange 40 has formed therein an annular recess 42 which receives an annular plate 44.

The plate 44 may be provided with any desired design, for example, the entire alphabet, as disclosed. Annular plate 44 may be made slightly smaller than the recess 42 so that the plate may be rotated within the recess by light finger pressure.

The decorated utensil of the present invention can be advantageously used in connection with the feeding of juveniles. To this end, a series of plates may be employed, each of which bears a design in which the child will be interested and may be used in an educational way by associating educational features with the designs. For example, a series of plates may be provided, each of which bears one letter of the alphabet and some identifying picture, for example the plate bearing the letter A can have a picture of an apple associated therewith and so on through the alphabet. The series of plates and the cooperative food or beverage container form an attractive and useful juvenile feeding set.

In the practice of the method of the invention, a plate bearing a design in which it is known that the child will be interested is inserted in position in the recess of the container and the container is filled with the food comprising the nourishment for a feeding period. The child is then told that there is a picture beneath the food which he would enjoy seeing but which he cannot see until all of the food is eaten. This has been found to be effective in inducing children to partake willingly of all of their nourishment at times when they would otherwise refuse their food or eat it reluctantly. When the child consumes the nourishment he then sees the picture and may be told any story in connection therewith that the attendant sees fit. He may also be told that he will be permitted to see another picture at his next feeding period, thereby creating an air of expectancy on the part of the child and encouraging him to partake of his nourishment in a way which does not impress upon him the fact that he is being encouraged to eat his food. This places the child in a mental state such that he derives the greatest benefit from his food in addition to the pleasure also obtained.

When the meal has been completed the plate may be readily removed from the recess in the container by inserting a fingernail in one of the niches, when the modification shown in Figs. 1, 2 and 4 is used, by sliding the plate out of the slot when the modification illustrated in Fig. 3 is used or by up-turning the receptacle and gently tapping the plate out of the recess when the modification shown in Figs. 5 and 6 is used.

The container then can be thoroughly washed and sterilized by boiling without damaging the design.

In each of the modifications of the invention disclosed there is always at least one surface of the design-bearing plates, such as a face or an edge, exposed to facilitate removal of the plate.

In using the modified form of the invention illustrated in Figs. 1 to 3, inclusive, it is possible to place the plate in the recess with the design facing downwardly. It is then necessary for the child to consume all of the food before the bowl can be turned upsidedown so that he can see the picture, and he is thereby prevented from pushing the last portion of the food to one side in order to see the picture before he has eaten all of the food.

In the modified form of the invention illustrated in Fig. 4 wherein the design is in contact with the food, it is preferable that the design be made water-proof, for example, by placing a coating of water-proof lacquer over the entire face of the design.

When using the modified form of the invention illustrated in Figs. 5 and 6, the plate 44 is placed within the recess 42 so that the first character of the series comprising the design is in position to be observed by the child. This character is then explained to him and if desired he may be told a story in regard to the character, and the plate 44 is then revolved so that the next character of the design in order can be observed by him. The character is explained as before. This is repeated throughout the entire series and while the child's attention is thus occupied he is induced to consume his food without appreciating that such is taking place.

The letters of the alphabet have been illustrated as a design for the plate 44 as an exemplification and the letters may be replaced by other

characters, for example, fictitious persons, animals, characters from fairy tales, etc.

The foregoing details have been given for the purpose of explanation and not limitation, since many changes may be made in the physical embodiments and the method disclosed without departing from the spirit of the invention which is to be limited only by the appended claims.

Having described the invention, what is claimed is:

1. A nourishment container comprising a bowl shaped body having a bottom section formed of transparent material, said bottom section being provided with a recess having a substantially straight and bevelled sidewall extending from the underneath side of said bottom section to a point beneath the top side thereof, a plate removably disposed within said recess and retained therein without distortion solely by frictional contact of the periphery with said sidewall, and a design carried by the top portion of said plate.

2. A nourishment container comprising a dished receptacle formed of transalucid material and having a recess extending upwardly from the lower surface of the bottom section thereof having a substantially straight sidewall which does not extend entirely through the bottom section and is slightly bevelled, a plate snugly disposed within said recess and retained therein without distortion from its normal shape solely by frictional contact between the periphery of said plate and the wall of said recess, and a design carried by the upper surface of said plate.

KNOX IDE.
GEORGE S. HILLS.

Nov. 16, 1948. B. B. MANASTER 2,453,922
CHILD'S COMBINATION APPETITE-STIMULATING AND AMUSEMENT DEVICE
Filed July 2, 1948

Fig. 1.

Fig. 2.

Fig. 3.

INVENTOR.
Ben B. Manaster
BY Clarence E. Shively
His Attorney.

UNITED STATES PATENT OFFICE

2,453,922

CHILD'S COMBINATION APPETITE-STIMULATING AND AMUSEMENT DEVICE

Ben B. Manaster, Chicago, Ill.

Application July 2, 1945, Serial No. 36,773

4 Claims. (Cl. 46—141)

1

This invention relates to child's combination appetite-stimulating and amusement devices.

An object of the invention is to provide a character simulating an animal such, for example, as a dog in a sitting position, adjacent a dish or bowl to stimulate a child's interest in eating by arranging the head of the character in a position which presents an appeal for something to eat, and which head is capable of vibratory or oscillating action by virtue of contact with a feeding spoon, whereby to simulate feeding action. It is the intent that this character thus arranged adjacent the dish or bowl will have the effect of inducing the child to alternately feed itself and the character, thus stimulating the child to consume its food.

Other objects will appear hereinafter.

The invention consists in the novel combination and arrangement of parts to be hereinafter described and claimed.

The invention will be best understood by reference to the accompanying drawings showing the preferred form of construction, and in which:

Fig. 1 is a perspective view of the invention showing the same in sitting position with respect to a bowl or dish;

Fig. 2 is a side elevational view of the same:

Fig. 3 is a vertical sectional detail view of the same.

To accomplish the several objects of my invention, I provide a character 10 which, in the present instance, is formed in the shape of a dog in sitting position upon its hind legs 11. The front legs or paws 12 of the dog are arranged with respect to the body 13 thereof so as to provide an undercut 14. The paws 12 slightly depend into the dish 16 so that the dish and the body 13 cannot be easily moved apart.

Formed through the body 13 is a channel or passage 15. The undercut 14 is of such depth as permits the bowl or dish 16 to be positioned with respect to the body 13 with the edge portion 17 disposed within the undercut 14 beneath the paws 12, with the channel 15 communicating with the interior of the bowl 16. By reason of the character of the wall 18 of the cut-out portion, bowls of various heights may be used, such as indicated at 16. This follows from the fact that the curved wall 18 permits the positioning of bowls of various heights within the undercut, with the interior of the bowl communicating with the channel 15 so that food or liquid passing through the channel 15 will move or flow into the bowl without spilling therefrom.

The head 20 of the dog is normally mounted

2

in spaced relation with respect to the neck portion 21 thereof with the portion 22 of the head [illegible] overlapping the nape 23 of the neck, [illegible] the overlapping portion 22 of the head [illegible] contact the nape of the neck to limit the [illegible] of the head 20 upwardly.

The head 20 is supported for vibratory or oscillatory movement upon the body 13 by means of a shaft [illegible] one end of which is fixedly embedded in the head 20 as at 25 and the opposite end 26 of which is removably projected in an opening 27 formed in the body 13.

Portions of the head and body are removed to provide clearance between the head and body and the shaft 24 as at 28. This clearance permits the head to vibrate or oscillate vigorously when contacted by the end of a spoon 29.

As before stated, the object of this invention is two-fold: First, to provide amusement for a child during eating, and, second, to stimulate eating of the food by the child. This may result from the fact that the child is instructed or suggested to give spoonfuls of food alternately to itself and the dog or other character.

The head of the dog normally is positioned with respect to the body so that the jaws 30 and 31 of the dog are in partially open, or "begging," position, being spaced apart a sufficient distance to permit initial insertion of the end of the spoon between the jaws 30 and 31. As the child attempts to discharge the food from the spoon into the mouth of the dog, the head 20 by pressure of the spoon 29 against the jaw 30 will be tilted rearwardly against the action of the shaft 24. When this pressure of the spoon is removed from jaw 30, the shaft 24, being of resilient material, will cause the head to vigorously vibrate or oscillate to simulate eating action by the dog. Food deposited in the mouth of the dog between the jaws 30 and 31 will be guided to the channel 15 by the jaw 30, which is concave transversely to provide a groove 31' leading to the channel 15, and such food will pass through the channel 15 back into the bowl 16. To a great extent, the overlapping portion 22 of the head will serve to prevent food from passing rearwardly out between the head of the dog and the body thereof.

While I have illustrated the character in the form of a dog, it is manifest that the character may take other forms of animals.

Inasmuch as the shaft 24 is fixedly secured to the head 20, the head may be removed by withdrawing the end 26 of the shaft from the opening 27 for cleansing purposes.

It will be noted that the relative position be-

tween the jaws of the head 28 and the dish 16 is such that the jaws project over the rim of the bowl or dish so that any food spilled during the feeding of the dog or other character, will fall back into the bowl 16.

While I have illustrated and described the preferred form of construction for carrying my invention into effect, this is capable of variation and modification without departing from the spirit of the invention. I, therefore, do not wish to be limited to the precise details of construction set forth, but desire to avail myself of such variations and modifications as come within the scope of the appended claims.

Having thus described my invention, what I claim as new and desire to protect by Letters Patent is:

1. A child's combination appetite-stimulating and amusement device comprising a body having an undercut portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw portion providing a rest for the end of a spoon delivering material to said channel, a head for said body and arranged over said channel and having a jaw portion in spaced confronting relation with respect to the jaw portion of said body and adapted to be engaged by the end of said spoon and tilted relative to said body by said spoon, and means connecting the head to the body for oscillatory movement with respect to the body when said spoon is moved from engagement with respect to said head.

2. A child's combination appetite-stimulating and amusement device comprising a body having an undercut portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw portion providing a rest for the end of a spoon delivering material to said channel, a head for said body and arranged over said channel and having a jaw portion in spaced confronting relation with respect to the jaw portion of said body and adapted to be engaged by the end of said spoon and tilted relative to said body by said spoon, and means connecting the head to the body for oscillatory movement with respect to the body when said spoon is moved from engagement with respect to said head, said means including a flexible shaft fixedly secured to the head and removably inserted in an opening formed in the body.

3. A child's combination appetite-stimulating and amusement device comprising a body having an undercut portion formed therein for the reception of the edge portion of a dish and having a channel therein inclined downwardly and forwardly toward the dish for communication with said dish, said body having a protruding jaw portion providing a rest for the end of a spoon delivering material to said channel, a head for said body and arranged over said channel and having a jaw portion in spaced confronting relation with respect to the jaw portion of said body and adapted to be engaged by the end of said spoon and tilted relative to said body by said spoon, and means connecting the head to the body for oscillatory movement with respect to the body when said spoon is moved from engagement with respect to said head, said head having a portion opposite the jaw portion thereof disposed in overlapping relation with respect to an adjacent portion of said body.

4. A child's combination appetite-stimulating and amusement device comprising a character simulating a dog in sitting position upon its hind legs with its front legs projecting forwardly over a cut-out portion provided in the body for the reception of the edge portion of a dish, with the ends of the front legs projecting over the rim of the dish, said body having an inclined downwardly extending channel formed therein for communication with said dish and said body being provided with a jaw portion providing a rest for the end of a spoon, a head for said body providing a jaw portion in confronting relation with respect to the jaw of said body and adapted for engagement with said spoon, a flexible shaft connecting the head to the body, said head being adapted to be tilted upwardly and away from said body by said spoon and when said spoon is disengaged from said head, said flexible shaft serving to oscillate said head to simulate eating action.

BEN B. MANASTER.

No references cited.

259 United States of America, }
Northern District of Illinois. } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations filed in this Court in the cause entitled: David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an Individual, Plaintiffs *vs.* Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, Defendants, No. 49-C-8, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the original exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 16th day of February, 1950.

(Seal)

Roy H. Johnson,
Clerk.

By Gizella Butcher,
Deputy Clerk.

260 IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an individual,
Plaintiffs-Appellees,
vs.
Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot,
Defendants-Appellants.
} Appeal No. 10118.

STIPULATION.

It Is Hereby Stipulated by and between the parties hereto, by their respective counsel, subject to the approval of this court, that the printing in the transcript of record of Defendant's Exhibit 5 (the file wrapper and contents of the application on which patent in suit 2,455,266 issued) may be dispensed with and said Defendant's Exhibit 5 may be treated before this court as a physical exhibit, and that the contents thereof may be referred to in the briefs and arguments and may be considered by this court.

Signed at Chicago, Illinois, this 24th day of February, 1950.

Sidney Neuman,
Attorney for Plaintiffs-Appellees,
Clarence E. Threedy,
Attorney for Defendant-Appellant.

It Is So Ordered:

.....
United States Circuit Judge.

Endorsed: Filed Feb. 27, 1950. Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed May 18, 1950, in:

Cause No. 10118.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman,
Plaintiffs-Appellees,

vs.

Crest Specialty (Not Inc.),
Defendant-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of December, A. D. 1950.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand, nine hundred and fifty, and of our Independence the one hundred and seventy-fifth.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, an individual, *Plaintiffs-Appellees,* 10118 *vs.* Crest Specialty (Not Inc.), a limited partnership consisting of Ben B. Manaster, Rose Manaster, Carol Ruth Manaster, and Sol Eliot, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

And afterward, to-wit, on the sixteenth day of October, 1950, there was filed in the office of the Clerk of this Court the Opinion of this Court which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10118. October Term and Session, 1950.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, *Plaintiffs-Appellees,* *vs.* Crest Specialty (Not Inc.), *Defendant-Appellant.* } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 16, 1950.

Before KERNER, DUFFY and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendants appeal from a judgment declaring plaintiffs' patent to Nudelman No. 2,455,266, issued November 30, 1948, valid and infringed. The appeal raises the vital issue of whether the trial court's findings are clearly erroneous.

Recognizing that parents frequently encounter difficulty in persuading their infant children to eat, Nudelman built a device intended to induce them to do so. The problem he faced and abortive attempts to solve it had been disclosed in various patented articles, such as "Coaxer" dishes. In his application, after reciting that it was "a well established fact that children in their early years are poor eaters and parents have to provide various attractions to interest them during feeding time," he stated that his object was to provide a stimulant, consisting of a simulated animal figure in the form of a small pig, having a body portion perched in an almost upright position upon the perimeter of a

child's feeding bowl.[1] The figure has a forwardly extending portion projecting toward the interior of the bowl and overlying a portion of it, formed by the animal's front legs. The pig is hollow. Its head opens, forming a mouth into which a spoon may be inserted. Extending from the mouth, in the words of the patentee, "solely downward," is a passageway, the rear wall of which forms an apron so that all the food put in will pass down into the bowl. When one part of the hinged head is raised and the mouth opened the content of the spoon is emptied into it and falls down the passage into the bowl. The device is provided with an undercut which fits upon and engages with the rim of the bowl, preventing separation of the figure from the dish during feeding to insure that food emptied into the image's mouth will pass back into the bowl. The portion of the figure overhanging the interior of the bowl does not extend all the way into that receptacle, so that the latter's area or capacity is not reduced in any way by the short downward passageway extending from the mouth. The underlying thought is to suggest that the animal is actually eating and swallowing, and thus to encourage and stimulate the child to follow the example, that is, to mimic the pig's action and take food itself. There was testimony that mothers who had experienced difficulty in feeding their infant children, by use of the device, had persuaded the youngsters to eat with much greater relish.

The District Court found the device to be unique and ingenious, to constitute a genuine improvement over any prior device and to be the first to teach the idea of providing an eating table companion for a young child. It found further that the feeding of the companion with the same food and from the same bowl and the appearance of the animal apparently consuming food provide a stimulant for the child to do likewise, and that the device is useful and novel and reflects patentable invention.

In attempting to prove anticipation, defendants relied

1. Typical Claim 2 is as follows: An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

chiefly upon Smith No. 2,207,417, whose structure, the court found, is not only entirely unlike that of Nudelman but diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his. The other cited references are so far afield, as the court found and as we agree, that it is unnecessary to consider them. Upon all of the evidence submitted, the District Court found that anticipation had not been proved and that conception and production of a device such as that shown and described by Nudelman is beyond the skill of the mechanic and requires exercise of inventive genius.

A careful examination of the evidence is convincing that the trial court had before it adequate substantial evidence to justify its findings. Upon the issue as to validity the facts are such as to bring the case within the scope of such decisions as *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, *Wahl Co.* v. *Andis Clipper Co.*, 66 F. 2d 162, *Pyle Nat. Co.* v. *Lewin*, 92 F. 2d 628 (CA-7), *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794 (CA-7).

The court found also that defendants' device infringes and that it is "literally and in substance" responsive to the claims in suit. Thus, it said, defendants' product consists of an animal figure in the form of a puppy, the body portion being designed and intended to be positioned outside and closely adjacent to a feeding bowl, as in Nudelman, and having a forwardly projecting portion which provides and consists of a simulated mouth, a lower jaw, neck portion and paws, in which is a passageway like that of Nudelman, which also extends downwardly and in open, unimpeded communication with the bowl. The figure's head is separable, thus permitting the contents of the spoon to be emptied into the mouth, as in Nudelman. The front paws overhang the rim of the bowl so as not to reduce the capacity or area thereof. The device has an undercut which engages the bowl and prevents separation of the figure and bowl during feeding so that the food emptied into the figure's mouth will pass back to the bowl, as in Nudelman.

In this connection defendants contend that its passageway from the mouth down into the bowl does not proceed directly downward, as prescribed by Nudelman. It is perfectly obvious that the passageway of each device proceeds downward toward the bowl. Such is the function and such the necessary structure in each, for, otherwise, the essen-

tial object of carrying the food down from the head back into the bowl could not be achieved. Considering the description and specifications of Nudelman as well as his claims, it is clear that what he intended by his language was that the passageway should proceed downwardly, without such slant or impediment as would prevent the law of gravity from carrying the food downwardly, as opposed to a passageway proceeding horizontally or at such a degree as to impede or prevent the law of gravity from carrying the food downwardly. Both devices so function; they are equivalents. The test as to whether infringement exists is whether the accused device does the same work in the same way and accomplishes the same result as the patented device. *Nordberg* v. *Woolery*, 79 F. 2d 685 (CA-7). The court's finding that defendants' device falls within this limitation, is, we think, supported by substantial and adequate evidence.

Needless to say, if the findings are well grounded in evidence, the judgment based thereon can not be successfully attacked. In other words, unless we can say, as a matter of law, that they are clearly erroneous, we are bound by them. *Graver Tank & Mfg. Co., Inc. et al.* v. *Linde Air Products Co.*, 336 U. S. 271, *Hazeltine Research, Inc.* v. *Admiral Corporation*, No. 10058, ... F. 2d ..... (CA-7). Here the court heard the testimony of a number of witnesses, including that of an expert. It expressly found the expert testimony, in certain respects, unworthy of credit. It saw demonstrations of the various devices in court. It passed upon the credibility of the witnesses. It acquired the knowledge that comes from practical demonstration of the two devices. Finally, it made its findings and conclusions of novelty, utility, patentable invention and infringement. To declare them clearly erroneous would be to overturn the trial court's decision upon controverted evidence and to usurp its function of passing upon the creditability of witnesses; this, under the authoritative decisions cited, we are not permitted to do.

The judgment is affirmed.

And on the same day, to-wit, on the sixteenth day of October, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Monday, October 16, 1950.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, *Plaintiffs-Appellees,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10118 *vs.*	
Crest Specialty (Not Inc.), *Defendant-Appellant.*	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

And afterward, to-wit, on the thirty-first day of October, 1950, there was filed in the office of the Clerk of this Court a Petition for Rehearing which said Petition for Rehearing is not copied herein.

And afterward, to-wit, on the sixth day of November, 1950, there was filed in the office of the Clerk of this Court an Answer to Petition for Rehearing which said Answer to Petition for Rehearing is not copied herein.

And afterward, to-wit, on the ninth day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, November 9, 1950.

Before:

Hon. Otto Kerner, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, *Plaintiffs-Appellees.* 10118 *vs.* Crest Specialty (Not Inc.), *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby, Denied.

And afterward, to-wit, on the sixteenth day of November, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, November 16, 1950.

Before:

Hon. Walter C. Lindley, Circuit Judge.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman, *Plaintiffs-Appellants,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
10118 *vs.*	
Crest Specialty (Not Inc.), *Defendant-Appellant.*	

On motion of counsel for the defendant-appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed until December 13, 1950 pursuant to the provisions of Rule 25 of the Rules of this Court.

And afterward, to-wit, on the twenty-second day of November, 1950, there was filed in the office of the Clerk of this Court a Designation of Record which said Designation of Record is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

David C. Trager, doing business as Topic Toys, and Eoina Nudelman,
Plaintiffs-Appellees,
vs.
Crest Specialty (Not Inc.),
Defendant-Appellant.
} Appeal No. 10,118.

DEFENDANT-APPELLANT'S DESIGNATION OF RECORD ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable Clerk of the United States Court of Appeals for the Seventh Circuit:

Sir:

Defendant hereby designates for inclusion in the printed record to be filed pursuant to Rule 38, Pars. 1 and 7, of the Rules of Practice of the Supreme Court of the United States, on a Petition for Writ of Certiorari, the following:

1. Printed record before the Court of Appeals.
2. Opinion dated October 16, 1950.
3. Judgment entered October 16, 1950.
4. Order denying petition for rehearing.
5. Order staying mandate.
6. This designation of record on petition for writ of certiorari.

Signed at Chicago, Illinois, this 22nd day of November, 1950.

Clarence E. Threedy,
Attorney for Defendant-Appellant.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 446

ORDER ALLOWING CERTIORARI—Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

4

Office - Supreme Court
FILED
DEC 8 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.) A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT.

CLARENCE E. THREEDY,
Attorney for Petitioner,
111 West Washington Street,
Chicago 2, Illinois.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

CREST SPECIALTY (NOT INC.) A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Crest Specialty (Not Inc.), respectfully prays for a writ to the United States Court of Appeals for the Seventh Circuit to review the judgment entered by that court on the 16th day of October, 1950.

The transcript of record in the case, including the proceedings in the Court of Appeals, is furnished forthwith in accordance with Rule 38 of the Rules of this Court. The decision of the Court of Appeals appears in the record at page 188.* The opinion of the trial court appears in the record at page 111.**

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*Such decision also appears in the advance sheets of the United States Patent Quarterly, Vol. 87, p. 139.

**The findings of fact and conclusions of law of the trial court are reported at 89 F. S. 199.

SUMMARY AND SHORT STATEMENT.

1. Respondents, David C. Trager, doing business as Topic Toys, and Eoina Nudelman, filed suit against petitioner, Crest Specialty (Not Inc.), for infringement of claims 2 and 3 of the Nudelman patent, No. 2,455,266, issued November 30, 1948, on a Children's Amusement Device.

2. On January 19, 1950 (R. 111), the District Court filed its Findings of Fact and Conclusions of Law holding claims 2 and 3 in issue valid and infringed, and on January 26, 1950 entered judgment (R. 119) in favor of respondents.

3. By its decision (R. 188) dated October 16, 1950, the Court of Appeals for the Seventh Circuit in this case affirmed the judgment of the District Court holding claims 2 and 3 valid and infringed.

4. The patent in suit by its specification (R. 133) and drawings (R. 132) discloses, and claims 2* and 3 define, a children's amusement device comprising a figure formed to simulate a living creature attachable to a feeding bowl and having a passage therein through which food from the bowl may be fed back into the bowl. The feeding bowl *per se* is not a part of the patented structure. Fig. 5 of

*Typical claim 2 reads as follows: An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

the drawings of the Nudelman patent is hereinafter reproduced on page 15 in comparison with Fig. 4 of a prior art patent to Smith, No. 2,207,417 (R. 170).

5. Nudelman by his claimed amusement device sought to provide an eating companion for a child and one which would encourage a child to eat by the process of mimicry.

6. When before the trial court, respondents acknowledged, and the trial court so found (R. 112) that

> "It was of the essence of Nudelman's concept that the device, employed for the purpose of providing instruction and encouragement for the child, simulate a living creature comprehensible to a child, and have body, head and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing, and encouraging the child to join the 'eating' table companion and to eat."

7. When before the trial court, respondents' counsel, after admitting (R. 66) that had a design patent been taken out on the claimed device instead of a mechanical patent, such design patent would have been invalid, argued that:

> "• • • it is very essential, in order to carry out Nudelman's concept, that you have a figure simulating a living creature, a living animal, so that you may put food into its jaws, which has the psychology of mimicry • • •."

8. As against the validity of the claims sued upon, petitioner cited and relied upon the prior art patent to Smith, No. 2,207,417 (R. 170).

9. The Smith patent by its specification (R. 171) and Fig. 4 of the drawing thereof (R. 170) discloses a bowl to which a hopper is detachably connected. Such hopper is provided with a passage discharging into the bowl for

the passage of food from the hopper into the bowl. A chart (Def. Exh. 2, R. 110) illustrating the device of claim 2 in suit in comparison with Fig. 4 of the Smith patent, is reproduced hereinafter, p. 15.

10. The object sought to be accomplished by Smith was to provide a cereal dish (R. 171)

> "which, due to the movement of the cereal into the liquid receiving portion, will interest a child eating cereal, in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereal by arousing their interest in the process of eating the same."

11. The Court of Appeals in this case in rejecting, as did the trial court, petitioner's contention that Smith disclosed a device which was not only capable of the accomplishments of the objects of the Nudelman device but also embodied a structure which was substantially the same as that claimed by Nudelman, said (R. 189-190):

> "In attempting to prove anticipation, defendants relied chiefly upon Smith No. 2,207,417, whose structure, the court found, is not only entirely unlike that of Nudelman but diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his. The other cited references are so far afield, as the court found and as we agree, that it is unnecessary to consider them. Upon all of the evidence submitted, the District Court found that anticipation had not been proved and that conception and production of a device such as that shown and described by Nudelman is beyond the skill of the mechanic and requires exercise of inventive genius.
>
> "A careful examination of the evidence is convincing that the trial court had before it adequate substantial evidence to justify its findings. Upon the issue as to validity the facts are such as to bring the

case within the scope of such decisions as *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, *Wahl Co.* v. *Andis Clipper Co.*, 66 F. 2d 162, *Pyle Nat. Co.* v. *Lewin*, 92 F. 2d 628 (C. A. 7), *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794 (C. A. 7)."

JURISDICTION.

1. The decision of the Court of Appeals was entered on October 16, 1950 (R. 188).

2. A petition for rehearing was denied by the Court of Appeals on November 9, 1950 (R. 193).

3. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347) and Sec. 5(b) of Rule 38 of this Court.

4. Cases believed to sustain the jurisdiction are:

Rule 38, Section 5(b) reading:

> "Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Duplate Corp. & Pittsburgh Plate Glass Co. v. *Triplex Safety Glass Co. of North America*, 298 U. S. 448.

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390.

Bacardi v. *Domenech Treasurer*, 311 U. S. 150.

QUESTION PRESENTED.

The decision of the Court of Appeals for the Seventh Circuit presents the following question:

Did the Court of Appeals in this case by its decision in holding claims 2 and 3 of the patent in suit valid depart from the test of invention as announced by the decisions of this Court?

REASONS RELIED UPON FOR ALLOWANCE OF THIS PETITION.

It is believed that the writ should be granted in this case for the following reasons:

1. In holding the patent in suit valid, the Court of Appeals has applied a test of invention which is contrary to the decisions of this Court as well as other Courts of Appeals.

2. The single question presented by this petition requires for its determination a pronouncement of what is the proper test of invention, thereby constituting the question one of great public importance for it not only affects the parties to this litigation, but it also affects every member of the public, particularly those dealing or concerned with patents.

3. Such question has long been a troublesome and perplexing question and one which arises without exception in every patent case in which the validity of a patent is put in issue.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

CREST SPECIALTY (Not. Inc.),
Petitioner,

By CLARENCE E. THREEDY,
Its Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

CREST SPECIALTY (NOT INC.) A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable The Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

The decision of the Court of Appeals for the Seventh Circuit now sought to be reviewed was entered October 16, 1950 (R. 188).

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347) and Sec. 5(b) of Rule 38 of this Court.

STATEMENT OF THE CASE.

To avoid repetition, reference is hereby made to the statement on pages 2 to 4, *supra*, of the Petition for Writ of Certiorari.

SPECIFICATION.

The following are the alleged errors of the Court of Appeals for the Seventh Circuit which will be urged before this Court:

1. The Court of Appeals erred in sustaining the judgment of the trial court adjudging and decreeing claims 2 and 3 of the patent in suit valid.

ARGUMENT.

Your petitioner in presenting the petition for writ of certiorari has done so, fully realizing that many like petitions have been presented to this Court in the hope and expectation that some definite formula may be announced which will serve as a proper test of invention; or, in the alternative, that this Court will not hesitate to announce that the test of invention as laid down by this Court in its decision in *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84; 62 S. Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, is no longer the test but

that the trier of each case shall formulate a test of invention according to the facts presented in such case.

Petitioner is motivated in the presentation of this petition for writ of certiorari, by the repeated rejection* by the Court of Appeals for the Seventh Circuit of the "flash of genius" test of invention as announced by this Court in the *Cuno* case, *supra.*

This case presents a situation where invention is said to have been spelled out upon the theory that the prior art device is "diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his" (R. 190). In other words, both the Court of Appeals and the trial court in this case have distinguished the claimed invention from the prior art in the light of the object accomplished, to-wit, that of teaching a child to eat by the process of mimicry. If the Court of Appeals had followed the test of invention as announced by this Court in the *Cuno* case, *supra,* it could have arrived at no other conclusion than that invention over the Smith patent (R. 170) is not spelled out by the claims in issue.

Is there to be a difference in measuring the standards of invention, among the several Courts of Appeals? In the language of the Court of Appeals for the Seventh Circuit in the case of *National Slug Rejectors, Inc.* v. *A. B. T. Manufacturing Corporation,* 164 F. 2d 812, is it the rule that

> "One court will reject what another accepts as patentable novelty, solely because of the difference in measuring standards"?

**Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.,* 132 F. 2d 812 (C. A. 7).
National Slug Rejectors, Inc. v. *A. B. T. Manufacturing Corp.,* 164 F. 2d 333 (C. A. 7).
Falkenberg v. *Bernard Edward Co.,* 175 F. 2d 427 (C. A. 7).
Peckat Mfg. Co. v. *Jacobs,* 178 F. 2d 794 (C. A. 7).

Is each of the ten Courts of Appeals to have its own test of invention, or should this Court lay down a test of invention to be followed by all Courts of Appeals? That is the important question which this petitioner presents to this Court for determination.

As the matter now stands among the several Courts of Appeals, if a manufacturer is sued for patent infringement in New York, he finds from a survey of the decisions of the Court of Appeals for the Second Circuit* that the test of invention is as announced by this Court in the *Cuno* case, *supra*, to-wit:

> "* * * the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling."

On the other hand, if such manufacturer is sued in Chicago, he is informed from a reading of the decisions of the Court of Appeals for the Seventh Circuit that the test of invention as announced by this Court in the *Cuno* case is flatly rejected.** This illustrates in a small but effective way the sharp conflict between the several Courts of Appeals as to what is a proper test of invention.

There is no conflict of decisions with respect to the patent in suit. Petitioner very frankly states that its hopes of obtaining the allowance of its petition are based upon the great importance of the single question presented, as this question affects every manufacturer who seeks to

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*_Weidhaas_ v. _Loew's Inc., et al._, 125 F. 2d 545 (C. A. 2). Other courts which have followed the *Cuno* case are as follows: _Anderson Co. et al._ v. _Lion Products Co., Inc. et al._, 127 F. 2d 454 (C. A. 1); _Pearson Sanding Mach. Co._ v. _Williams Furniture Co._, 132 F. 2d 55 (C. A. 4); _Trabon Engineering Corp._ v. _Dirkes et al._, 136 F. 2d 24 (C. A. 6); _Freeman et al._ v. _Altvater et al._, 138 F. 2d 854 (C. A. 8); _Standard Cap & Seal Corp._ v. _Coe_, 124 F. 2d 278 (App. D. C.); _In re Shortell_, 142 F. 2d 292 (C. C. P. A.).

**_Chicago Steel Foundry Co._ v. _Burnside Steel Foundry Co._, 132 F. 2d 812 (C. A. 7); _Falkenberg_ v. _Bernard Edward Co._, 175 F. 2d 427 (C. A. 7).

determine whether a patent upon which a charge of infringement is based, spells out invention. It is as much to his interest to know what the test of invention is, as it is to the patentee who asserts the charge of infringement.

Upon the foregoing premises, your petitioner prays that its petition be granted; that a writ of certiorari be issued and the case reviewed; and the judgment of the Court of Appeals with respect to the validity of the patent sued upon be reversed.

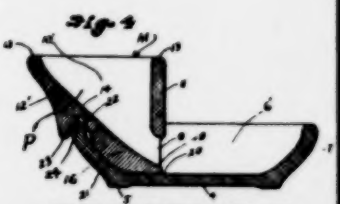
Respectfully submitted,

CREST SPECIALTY (NOT INC.),
Petitioner,

By CLARENCE E. THREEDY,
Its Attorney.

Chicago, Illinois,
December 6, 1950.

PATENT 2,456,266 IN SUIT



PRIOR ART PATENT 2,207,417
TO I.A. SMITH

CLAIM 2

An amusement device comprising

10 ..... a figure formed-to-simulate-a-living-creature, ... 10'

said figure comprising
16 ..... a body portion ..... 12', 23
adapted to be placed adjacent the exterior of
22 ..... a feeding bowl, ... 6'

said body portion having
27 ..... a forwardly extending portion 16
adapted to extend closely adjacent to and
overlie a portion only of said bowl,

said forwardly extending portion having
32 ..... a simulated mouth ..... M
24 ..... and a passage, ... P

said passage having
25 ..... walls extending solely downward 14
from said mouth through said forwardly
extending portion, whereby the contents of a
spoon may be emptied into said simulated mouth
and fall by gravity into said feeding bowl,

said forwardly extending portion including
20 ..... means preventing lateral movement 22
of said passage from over said bowl.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioners,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPONDENTS' BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

SIDNEY NEUMAN,
MAX R. KRAUS,
Attorneys for Respondents.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPONDENTS' BRIEF.

May It Please the Court:

This is an ordinary patent case which involved in the courts below the usual issues of validity and infringement. There are concurrent findings by the courts that claims 2 and 3 of the Nudelman patent in suit are valid and infringed. Unlike *Great A. & P. Tea Co.* v. *Supermarket Equipment Co.*, ... U. S. ..... (No. 32, October Term, 1950, decided December 4, 1950) where there was no finding of any additional or different function performed by the elements of the combination, this case involves a pat-

ented device which the trial court expressly held (R. 118) "involves a *new* principle and function, and achieves a *beneficial* result."* In affirming, the Court of Appeals stated (R. 190) that the patented device was "*diametrically opposed in purpose and function*, having * * * an object entirely different" from the principal prior art patent relied upon to negative validity.

Cases believed to require the denial of the petition are:

Keller v. *Adams-Campbell Co.*, 264 U. S. 314, 319.
Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 393.
United States v. *McFarland*, 275 U. S. 485.
Southern Power Co. v. *North Carolina Pub. Service Co.*, 263 U. S. 508.
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I.

The Court of Appeals (Circuit Judges OTTO KERNER, F. RYAN DUFFY and WALTER M. LINDLEY), after its own careful examination of the evidence, was convinced that the trial court (Hon. MICHAEL L. IGOE) had before it "adequate substantial evidence to justify its findings" (R. 190). With reference to the findings and the evidence in which they were grounded, the Court said (R. 191):

> "Here the court heard the testimony of a number of witnesses, including that of an expert. It expressly found the expert testimony, in certain respects, unworthy of credit. It saw demonstrations of the various devices in court. It passed upon the credibility of the witnesses. It acquired the knowledge that comes from practical demonstration of the two devices."

The Court of Appeals therefore concluded that to declare the findings clearly erroneous (R. 191):

---

* Emphasis in quotations added, except when otherwise indicated.

> "would be to overturn the trial court's decision upon controverted evidence and to usurp its function of passing upon the creditability of witnesses • • •"

It is accordingly plain that the facts were in dispute and that the issue of validity raised by petitioners was contingent upon resolving conflicting testimony.

II.

Petitioners admit (Petition, p. 12) that there is "no conflict of decisions with respect to the patent in suit."

Candor should have also required them to admit that they seek to bring the case to this Court to fight a phantom. The broad issue presented by the petition as being of great public importance is predicated upon an assumption taken by petitioners contrary to the record, and constitutes a misinterpretation and distortion of the opinion of the court below.

There is no basis whatever either in the opinion of the court below or in the particular facts of this case for the contention that the Court of Appeals has rejected the "flash of genius" test of invention as announced by this Court in *Cuno Eng. Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84. Neither that case nor the "flash of genius" test are referred to, expressly or otherwise. One may search the opinion of the court below (R. 188-191) in vain for the perverted view of it presented by petitioners. What the court held was that the Nudelman patent was *not anticipated* and that the conception and production of the Nudelman device was beyond the skill of the mechanic and required *exercise of inventive genius* (R. 190). The facts were said to bring the case within the scope of such cases, *inter alia* as *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464.

Whether or not the Court of Appeals rejected the *Cuno* test in the earlier cases mentioned in the petition (p. 11), *viz., Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, 132 F. 2d 812; *National Slug Rejectors, Inc.* v. *A. B. T. Mfg. Corp.*, 164 F. 2d 333; *Falkenberg* v. *Bernard Edward Co.*, 175 F. 2d 427; *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794, is, in our submission, most irrelevant here. The Court did not do so in the case at bar. Moreover, if the last three cases were not taken for review (*vide*, 333 U. S. 832; 338 U. S. 870; and 339 U. S. 915), then certainly the opinion in the case at bar, which does not even remotely suggest a rejection of the "flash of genius" test, is not required to be reviewed.

Hence, there are here no questions of importance to the public as distinguished from the parties.

III.

What petitioners really seek is a review in this Court of disputed facts and conflicting testimony; they would have this Court find the facts different from those found by the courts below.

For example, as we now show, in order to agree with petitioners "that invention over the Smith patent (R. 170) is not spelled out by the claims in issue" (Petition, p. 11), it would be necessary for this Court to set aside the trial court's findings that Smith patent No. 2,207,417 (R. 170) "does not, either alone or in combination with other patents, show the device of the Nudelman patent in suit to be lacking in novelty" (F. F. 15, R. 115), as well as to upset the credibility finding that the testimony of petitioners' expert respecting the Smith patent was "lacking in verity" and constituted an "unreasonable distortion of the language of the claim" (F. F. 15(e), R. 116).

The Prior Art Smith Patent Is "Entirely Unlike" Nudelman and "Diametrically Opposed in Purpose and Function." It Neither Anticipates Nor Negatives Invention.

While it is true that Smith stated that a child eating cereal would be interested in the movement of the cereal from the hopper into the bowl (R. 171; Petition, p. 4), it was conceded by petitioners' expert that these references related to a concept "quite different from that of Nudelman" (F. F. 15(d), R. 116), and he conceded that he was unable to find in the Smith patent "any teaching of stimulating and encouraging infants to eat by psychology and mimicry" (*id.*).

Petitioners' expert also admitted (F. F. 15(d), R. 116):

> "that it is contrary to Smith's express teachings to take spoonfuls of mixed cereal and milk from the bowl and put them back into the hopper."

And (*id.*):

> "that there is no suggestion or hint in the Smith patent of such an operation."

There is no evidence that anyone prior to the trial below ever regarded Smith's device as a solution of the feeding problem tackled by Nudelman or even thought of so using it. Smith's application was filed in 1938; his patent issued in 1940. Yet the art was taught absolutely nothing concerning utilitarian educational amusement devices to aid in the feeding of children. Smith's device, hence, fell far short of producing any desirable results. It apparently began and ended its uneventful career in 1938 when the application was filed. It seems to have occurred to no one that this device was the answer to the problem. The testimony of the witnesses Scharie and Eliot (R. 22, 26-27) is to the effect that in 1948—ten years after Smith's application date—there was a crying demand for a device of the

type shown in the Nudelman patent. This historical fact alone compels the conclusions that Smith's device was not used because it was not usable and that it is not identical to Nudelman and will not serve his purpose.

In support of the finding of no anticipation the trial court found (F. F. 15(b), R. 116):

> "It is the avowed purpose of Smith, repeatedly stressed in the patent, to maintain precooked dry cereals in the hopper and bin separated from the milk, thereby to retain original crispness and to aid digestion by more intensive mastication of food. The hopper of Smith was not designed or intended to perform the function of the device shown in the Nudelman patent. Moreover, it is contrary to the express purpose of the Smith device to return food to the hopper from the bowl. The device of the Smith patent has an object in view which is *entirely different* from that of Nudelman. It is used under *radically different conditions* to perform a function *quite different* from that of the Nudelman device, and it employs an *antithetical principle of operation.*"

This finding is well grounded in the evidence. Thus, the Court of Appeals held (R. 190):

> "A careful examination of the evidence is convincing that the trial court had before it adequate substantial evidence to justify its findings."

The "Achilles heel" of the comparison found at page 15 of the petition is found in the unwarranted liberties taken by petitioners' expert with the words "body portion" of the patent claims and in his distorted appraisal of the Smith structure. This expert read the claims as though they existed *in vacuo;* he shut his eyes to the Nudelman disclosure and gave to the words of the claims any meaning which pleased him.

The "body portion" called for in Nudelman's claim and which is required to be *placed adjacent the exterior of the*

bowl is the body 10. This is the *main, central, and principal* portion of the pig, and is necessarily so both in the light of the disclosure and in accordance with ordinary dictionary definition.* From Nudelman's main body portion an auxiliary or smaller portion projects inwardly or into the bowl.

On the other hand, the main, central or principal portion of Smith's hopper, *i. e.*, the "body portion" thereof, is found *disposed on the interior of the bowl* with a very small portion of the wall thereof projecting above the bowl rim. It is a perversion not only of the English language, but of Smith's structure as well, to label this small portion of the wall 12 and the beaded projection 23 the "body portion."

The testimony of petitioners' expert (and with it his comparison exhibit found at page 15 of the petition) was rejected by the trial court in the following finding (R. 116):

> "The testimony of defendants' patent expert in which he applied the language of claim 2 of the Nudelman patent in suit to the structure of Fig. 4 of the Smith patent *must be rejected as lacking in verity.* This testimony constituted an unreasonable distortion of the language of the claim, and wholly failed to take into account the meaning and sense of the language, the disclosure of the patent in suit and its objects and purposes. Read upon the device of Fig. 4 of the Smith patent, claim 2 of the Nudelman patent in suit ceases to represent the invention of Nudelman."

In order to make Smith like Nudelman, it is necessary to change, redesign and *relocate* essential parts of the hopper as well as to impress new and different functions upon

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* Webster's New International Dictionary defines "body" *inter alia* as "The Trunk, or main part (esp. of a person, animal, or plant), as distinguished from the limbs and the head; the main, central, or principal part, as of a tree, army, country, structure, building, etc."

them, *i. e.*, employ them in a manner never contemplated,—indeed, *inconsistent with Smith's disclosure*, for it is "diametrically opposed in purpose and function," as was stated by the Court of Appeals (R. 190). A prior device not designed, nor adapted, nor actually used for the performance of the function of the patented device does not anticipate (*Topliff* v. *Topliff*, 145 U. S. 156, 161).

Furthermore, the evidence in this case dicloses all of the criteria or symptoms* of invention.

The factual historical background of the Nudelman invention is covered by a finding of fact which petitioners do not challenge. Thus, there was a substantial demand for a satisfactory device to solve a long-standing problem (F. F. 7, 8, 9, R. 112-113). Defendant Eliot, who had been in the business of manufacturing and selling related items for a number of years prior to 1948, found, on a survey conducted by him, that there was a market in 1948 for a device of the type shown in the patent in suit. As of August, 1948, he estimated that such a device could be sold and distributed in "large numbers," about 90,000 a month (R. 26-27), and he thought the demand was sufficient enough to warrant an investment of $55,000.00 (R. 25-27).

The problem was solved by Nudelman (F. F. 7, R. 112). His device which solved the problem and satisfied the demand was found by the trial court to be "unique" and "ingenious" and to constitute a "genuine improvement over any prior device" (F. F. 10, R. 113). Petitioners have characterized the infringing device (F. F. 10, R. 113) as "unusual" and *sparked* with "cleverness, color and imagination"—a "frank and apparently a just tribute" (cf. *Potts* v. *Creager*, 155 U. S. 597, 610).

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* Regardless of precise and comprehensive definitions of the test and whether we speak in terms of "inventive genius", "intuitive genius", "genius or invention" or "flash of creative genius."

Conclusion.

The decision below is correct. It is in accord with applicable decisions of this Court and is not in conflict with decisions of other courts of appeals either as to the patent in suit or as to any rules of decision. This case, moreover, does not involve any principles or issues settlement of which is of importance to the public as distinguished from the parties.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIDNEY NEUMAN,
MAX R. KRAUS,
Attorneys for Respondents.

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Respondents.

REPLY BRIEF FOR PETITIONER.

Re Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

CLARENCE E. THREEDY,
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REPLY BRIEF FOR PETITIONER.

Re Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is petitioner's reply to respondents' brief urging that certiorari be denied.

The respondents in their brief in urging that the petition for certiorari be denied have made reference to and attempted to distinguish (p. 1) this case from the very recent decision of this Court in the case of the *Great Atlantic &*

Pacific Tea Co. v. *Super Market Equipment Corp.*, decided December 4, 1950, and reported in Volume 87 U. S. P. Q. 303. In that case this Court set forth its ideas as to the high standard which must be used in judging what constitutes patentable invention. The decision was particularly concerned with a combination claim. The claims of the Nudelman patent here in issue are combination claims, defining a device squarely within the definition of a "gadget," which, in the concurring opinion in the case above referred to, it is said has "no place in the Constitutional scheme of advancing scientific knowledge".

The decision of the Court of Appeals for the Seventh Circuit in this case in affirming the judgment of the District Court holding such combination claims valid and infringed was decided October 16, 1950, prior to the decision of this Court in the *Great Atlantic & Pacific Tea Co.*, case, *supra*. The petition for writ of certiorari in this case was filed December 6, 1950, two days subsequent to the decision of this Court in the *Great Atlantic & Pacific Tea Co.* case, *supra*.

The petition for writ of certiorari here presents for determination substantially the same question presented in the latter case, namely, whether the Court of Appeals for the Seventh Circuit in this case applied correct criteria of invention. In two cases where related questions are presented, this Court has frequently heard and determined the co-related petitions.*

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* Illustrative cases in which this was done are:
Phelps Dodge Corporation v. *National Labor Relations Board*, and *Continental Oil Co.* v. *National Labor Relations Board*, Nos. 387 and 413; *Consolidated Rock Products Co.* v. *Du Bois*, and *Badgley et al.* v. *Du Bois*, Nos. 400 and 444; *Guggenheim* v. *Rasquin*, and *Powers* v. *Commissioners*, Nos. 92 and 486, respectively; *Helvering* v. *Oregon Mutual Life Insurance Co.* and *Helvering* v. *Pan-American Life Insurance Co.*, Nos. 564 and 264, respectively; *Helvering* v. *Janney* and *Gaines et al.* v. *Helvering*, Nos. 36 and 113.

Petitioner is of the firm belief and opinion that had the Court of Appeals for the Seventh Circuit had the benefit of this Court's decision as announced in the *Great Atlantic & Pacific Tea Co.* case, *supra,* it would have held the two claims in issue (which define a device which does not structurally or functionally differ from the prior art in any substantial degree) invalid as not having met the Constitutional test of invention as now laid down by this Court in the case referred to.

Unless certiorari is granted in this case, the slight factual differences between this case and the *Great Atlantic & Pacific Tea Co.* case, *supra,* will undoubtedly be regarded as distinguishing the two cases and result in erroneous interpretation of this Court's decision in the *Great Atlantic & Pacific Tea Co.* case, which latter case has been in two recent decisions relied upon as the now-existing law with respect to the test of invention. *Vapor Blast Mfg. Co., et al.* v. *Pangborn Corp.* (C. A. 4th), 88 U. S. P. Q. 35 at 39; *Ingersoll-Rand Co.* v. *Black & Decker Mfg. Co.* (D. C. Md.), 88 U. S. P. Q. 150 at 152.

It is respectfully submitted that under the foregoing circumstances, the petition for writ of certiorari as prayed for by petitioner should be granted.

Respectfully submitted,

CLARENCE E. THREEDY,
Attorney for Petitioner.

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BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

INTRODUCTION.

This cause is before this Court on writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, holding the Nudelman patent in suit (R. 131) valid as to claims 2 and 3.

OPINIONS OF THE COURTS BELOW.

The District Court's Findings of Fact and Conclusions of Law (R. 111) holding the patent in suit valid and infringed as to claims 2 and 3, are reported in 89 F. S. 199.

The opinion (R. 188) of the United States Court of Appeals for the Seventh Circuit which affirmed the judgment (R. 119) of the District Court is reported in 184 F. 2d 577, 87 U. S. P. Q. 139.

JURISDICTION.

The date of the judgment (R. 188) to be reviewed is October 16, 1950. Rehearing denied November 9, 1950 (R. 193).

The writ of certiorari was granted by this Court February 26, 1951.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a) as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347), and Section 5(b) of Rule 38 of this Court.

Unless otherwise noted, emphasis briefwriter's.

STATEMENT OF THE CASE.

Respondents, David C. Trager, doing business as Topic Toys, and Eoina Nudelman, filed suit against petitioner, Crest Specialty (Not Inc.), for infringement of claims 2 and 3 of the Nudelman patent, No. 2,455,266, issued November 30, 1948, on a Children's Amusement Device.

On January 19, 1950, the District Court filed its Findings of Fact and Conclusions of Law (R. 111) holding claims 2 and 3 in issue valid and infringed, and on January 26, 1950, entered judgment (R. 119) in favor of respondents.

By its decision (R. 188) dated October 16, 1950, the Court of Appeals for the Seventh Circuit in this case affirmed the judgment of the District Court holding claims 2 and 3 valid and infringed.

The patent in suit by its specification (R. 133) and drawings (R. 132) discloses, and claims 2* and 3** define, a children's amusement device comprising a figure formed to simulate a living creature attachable to a feeding bowl and

* Typical claim 2 reads as follows: An amusement device comprising a figure formed to simulate a living creature, said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl, said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl, said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said simulated mouth and fall by gravity into said feeding bowl, said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.

** Claim 3 is substantially identical to claim 2, with the exception that in claim 3 there is added to the structure of claim 2 a head secured to the forwardly extending portion of the body and movable to permit the contents of a spoon to be emptied into the mouth.

having a passage therein through which food taken from the bowl by a spoon and emptied into the passage may fall by gravity into the bowl. The feeding bowl *per se* is not a part of the patented structure. Respondents never sold the patented device separate and apart from a set (Plf. Exh. 4) consisting, in addition to the patented device, of a bowl not covered by the claims, nor separate and apart from a set (Plf. Exh. 3) consisting, in addition to the patented device, of an unpatented bowl, spoon, fork, and rack for the spoon and fork (R. 19-20).

Fig. 5, here reproduced, of the drawings of the Nudelman patent illustrates the claimed device mounted upon a feeding bowl.

Fig.5.

It is written in the specification of the patent in suit (R. 133, Par. 3) that "One of the objects of the invention is to provide an amusement device, attachable to the child's feeding bowl and having means whereby the device can be fed and the food returned to the bowl." By the use of such a device, it is claimed by Nudelman that a "mother can feed the child and the amusement device, thus providing a stimulant for the child to eat" (R. 133, col. 2, par. 3).

To accomplish such object, the trial court found (R. 112) that:

> "It was of the essence of Nudelman's concept that the device, employed for the purpose of providing instruction and encouragement for the child, simulate a living creature comprehensible to a child, and have body, head and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing, and encouraging the child to join the 'eating' table companion and to eat."

Respondents, when before the trial court and after admitting (R. 66) that had a design patent been taken out on such device instead of a mechanical patent, such design patent would have been invalid, argued that:

> "* * * it is very essential, in order to carry out Nudelman's concept, that you have a figure simulating a living creature, a living animal, so that you may put food into its jaws, which has the psychology of mimicry * * *."

As against the validity of the claims sued upon, petitioner cited and principally relied upon the prior art patent to Smith, No. 2,207,417 (R. 170) and to Theodoropulos, No. 1,792,129 (R. 158), the latter patent showing it to be old to hinge a head on a figure having a passage and formed to simulate a living creature.

The Smith patent by its specification (R. 171) and Fig. 4 of the drawing thereof (R. 170) discloses a bowl 6 to which a device 10', called a "hopper," is detachably connected. Such hopper is provided with a passage discharging into the bowl for the passage of food from the hopper into the bowl. A chart (Def. Exh. 2, R. 110) illustrating the device of typical claim 2 in suit in comparison with Fig. 4 of the Smith patent, is reproduced hereinafter opposite page 9. Fig. 4 of the Smith patent is exemplified by Def. Exh. 3-3a.

Smith by his specification (R. 171, Par. 4) points out that it was an object of his invention to provide a cereal dish

> "which due to the movement of the cereal into the

> liquid receiving portion, will interest a child eating cereal, in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereal by arousing their interest in the process of eating the same."

The Court of Appeals in this case in rejecting (R. 189), as did the trial court (F. F. 15b, R. 116), petitioner's contention that in view of the prior art, particularly the Smith patent (R. 170), the patent in suit by claims 2 and 3 did not spell out invention within the meaning of and as contemplated by the Revised Patent Statutes, Section 4886* (35 U. S. C. 31), said (R. 189-190):

> "The District Court found the device to be unique and ingenious, to constitute a genuine improvement over any prior device and to be the first to teach the idea of providing an eating table companion for a young child. It found further that the feeding of the companion with the same food and from the same bowl and the appearance of the animal apparently consuming food provide a stimulant for the child to do likewise, and that the device is useful and novel and reflects patentable invention.
>
> "In attempting to prove anticipation, defendants relied chiefly upon Smith No. 2,207,417, whose structure the court found, is not only entirely unlike that of

* R. S. 4886 (35 U. S. C. 31): "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

Nudelman but diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his. The other cited references are so far afield, as the court found and as we agree, that it is unnecessary to consider them. Upon all of the evidence submitted, the District Court found that anticipation had not been proved and that conception and production of a device such as that shown and described by Nudelman is beyond the skill of the mechanic and requires exercise of inventive genius.

"A careful examination of the evidence is convincing that the trial court had before it adequate substantial evidence to justify its findings. Upon the issue as to validity the facts are such as to bring the case within the scope of such decisions as *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, *Wahl Co.* v. *Andis Clipper Co.*, 66 F. 2d 162, *Pyle Nat. Co.* v. *Lewin*, 92 F. 2d 628 (CA-7), *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794 (CA-7)."

In so concluding, it is petitioner's contention that the Court of Appeals in this case, as did the trial court, failed to take into account and follow the criteria of invention as announced by the decisions of this Court, particularly in *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, and *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303.

SPECIFICATION OF ERROR.

The error urged by petitioner is that the Court of Appeals erred in sustaining the judgment of the trial court adjudging and decreeing claims 2 and 3 of the patent in suit valid.

ARGUMENT.

Had the Court of Appeals for the Seventh Circuit in This Case Applied the Criteria of Invention as Announced by this Court in Cuno Engineering Corporation v. Automatic Devices Corporation, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, and in This Court's Most Recent Decision in The Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation (Decided December 4, 1950), 340 U. S. 147, 87 U. S. P. Q. 303, It Would Have Held Claims 2 and 3 of the Patent in Suit Invalid.

If it could be conceded that the purpose and function of the device of the Nudelman patent in suit, to-wit, that of enabling a mother to feed the child and the amusement device thereby to provide a stimulant for the child to eat (R. 133, Col. 2, Par. 3), was new and useful, as apparently the Court of Appeals in this case concluded,* such fact, under the decisions of this Court, is not alone sufficient to make this device patentable. In *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 S. Ct. 37, 86 L. Ed., 58, 51 U. S. P. Q. 272, it was succinctly stated by this Court that:

> "Under the Statute (35 U. S. C. 31; R. S. 4886) the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'."

This Court went on to say (p. 91) that:

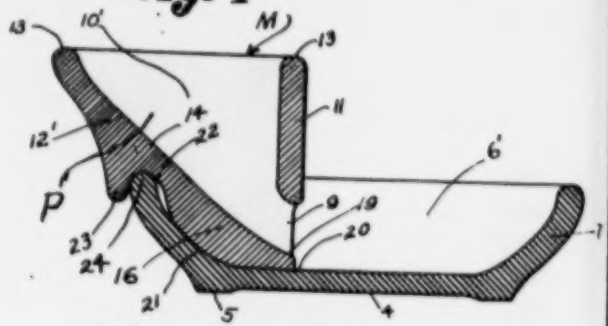
> "That is to say the new device, however useful it

* With respect to the Smith patent No. 2,207,417 (R. 170), the Court of Appeals in this case said (R. 190) that the disclosure thereof was "diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his [Nudelman's]."

Fig. 5.

PATENT 2,455,266 IN SUIT

Fig. 4



PRIOR ART PATENT 2,207,417
TO I.A. SMITH

CLAIM 2

An amusement device comprising

10 ..... a figure ~~formed to simulate a living creature~~, ... 10'

said figure comprising

16 ..... a body portion ..... 12', 23

adapted to be placed adjacent the exterior of

22 ..... a feeding bowl, ... 6'

said body portion having

27 ..... a forwardly extending portion 16

adapted to extend closely adjacent to and overlie a portion only of said bowl,

said forwardly extending portion having

32 ..... a ~~simulated~~ mouth ..... M

24 ..... and a passage, ... P

said passage having

25 ..... walls extending solely downward 14

from said mouth through said forwardly extending portion, whereby the contents of a spoon may be emptied into said ~~simulated~~ mouth and fall by gravity into said feeding bowl,

said forwardly extending portion including

20 ..... means preventing lateral movement 22

of said passage from over said bowl.

> may be, must reveal the flash of creative genius, not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain."

Tested by this principle, the patentee Nudelman of the patent in suit did nothing to promote the arts and sciences as is a necessary and indispensable requirement of the right to a Constitutional grant of a patent monopoly.*

In this connection, the prior art Smith patent, No. 2,207,417 (R. 170), as does the patent in suit, has for one of its purposes that of amusing and stimulating a child to eat food against which it would otherwise rebel. It is written in the Smith patent (R. 171, l. 39, col. 1):

> "It is also *a purpose of my invention* to provide a cereal dish of the above mentioned character, which, due to the movement of the cereal into the liquid receiving portion, *will interest a child eating cereal in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character,* thus aiding in feeding such children cereal *by arousing their interest* in the process of eating the same."

Such object is accomplished by Smith by a structure which is substantially identical to that of the claimed device. This is crystal clear from the chart (Def. Exh. 2, R. 110) appearing opposite, illustrating a comparison between typical claim 2 of the patent in suit and the Smith disclosure.

Without exception, every element of typical claim 2 in issue is found, in the same relationship with respect to each other, in the Smith patent (R. 170). Such patent, like the Nudelman patent in suit, discloses a passage which, like that of the claimed device, leads to and discharges into

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* In Art. I, Sec. 8, of the U. S. Constitution, Congress is given the power "to promote the progress of science and the useful arts" by securing for limited terms to authors and inventors the exclusive rights to their respective writings and discoveries.

a bowl, thus enabling a mother, while using the Smith device in the feeding of a child, to take a spoonful of the contents of the bowl and deposit the same into the passage for gravitation back into the bowl. Identical means (20, Fig. 5 of Nudelman; 22, Fig. 4 of Smith—see chart, Def. Exh. 2, appearing herein) is employed by Smith and Nudelman to prevent lateral displacement of such passage from over the bowl.

While Smith preferred to form the device providing this passage, in the form of a hopper, the patentee Nudelman preferred to form his device to simulate a living creature. In this connection, the trial court in this case found that (F. F. 6, R. 112):

> "It was of the *essence of Nudelman's concept* that the device, employed for the purpose of providing instruction and encouragement for the child, *simulate a living creature* comprehensible to a child and have body, head, and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing and encouraging the child to join the 'eating' table companion and to eat."

Such Finding of Fact was prompted by the argument of respondents (R. 66) who, after admitting (R. 66, last par.) that had a design patent been taken out on the claimed device instead of a mechanical patent, such design would have been invalid, argued that:

> "* * * it is *very essential*, in order to carry out Nudelman's concept, that you have a *figure simulating a living creature*, a living animal, so that you may put food into its jaws, which has the psychology of mimicry * * *."

In carrying out such alleged concept, all that the patentee Nudelman of the patent in suit did was merely to bring forward from the prior art the old device of the Smith patent 2,207,417 (R. 170). As would be natural for any artisan skilled in his field, Nudelman formed, as taught

by the prior art, such old device to simulate a living creature, to attract the interest of a child and to encourage it to eat by the so-called process of mimicry. By so doing, the patentee has added nothing to the sum of useful knowledge. It was old in the art to form the handles of knives and forks to simulate living creatures to attract the attention of and to encourage a child to eat (see F. F. 8, R. 112, 113). Patent No. 1,751,773 (R. 152) to Trosper, disclosed a doll constructed in a manner whereby "a child may simulate feeding her doll or other figure." See also Patent Nos. 2,200,696 (R. 166) and 2,224,683 (R. 174) relating to child's coaxer dishes.

Having done nothing to promote the arts and sciences and having added nothing to the sum of useful knowledge, under the criteria of invention as announced by this Court in *Cuno Engineering Corporation* v. *Automatic Devices Corporation*, 314 U. S. 84 at 91, 62 Ct. 37, 86 L. Ed. 58, 51 U. S. P. Q. 272, to-wit:

> "* * * the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling, * * *"

the patentee Nudelman is not entitled to a right to a private grant on the public domain.

To petitioner's knowledge, the "flash of genius" test of invention as announced in the *Cuno* case, *supra*, has been followed and applied by every Court of Appeals with the exception of the Court of Appeals for the Seventh Circuit. Such Court has in a number of cases of recent origin made known that it has rejected* this "flash of genius" test of invention as announced in the *Cuno* case, *supra*.

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* *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, 132 F. 2d 812 (C. A. 7), decided January 20, 1943.

National Slug Rejectors, Inc. v. *A. B. T. Manufacturing Corp.*, 164 F. 2d 333 (C. A. 7), decided October 17, 1947.

Falkenberg v. *Bernard Edwards Co.*, 175 F. 2d 427 (C. A. 7), decided June 21, 1949, was an appeal from the trial court's finding

In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303 (decided December 4, 1950), this Court set forth, as it did in the *Cuno* case, *supra*, its ideas as to the high standards which are to be used in judging what constitutes patentable invention. *The Great Atlantic & Pacific Tea Company* case was particularly concerned with a combination claim. Claims 2 and 3 of the Nudelman patent here in issue are combination claims. Such claims clearly define a device squarely within the definition of a "gadget", which, in the concurring opinion* in the case above re-

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that while the patented device was novel, presented genuine improvement, and had remarkable public acceptance, there was absent the flash of genius as described in the *Cuno* case. The 7th Circuit Court of Appeals in holding that the trial court erred in applying the "flash of genius" test, said (p. 428): "As we have done heretofore (*Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, *supra*), we reject the flash of genius test. We shall concentrate our scrutiny on whether in the claimed invention Falkenberg displayed more ingenuity than a workman skilled in his line of work."

Peckat Mfg. Co. v. *Jacobs*, 178 F. 2d 794 (C. A. 7), decided December 12, 1949.

Barie v. *Superior Tanning Company*, 182 F. 2d 724 (C. A. 7), decided June 16, 1950.

* In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, Mr. Justice Douglas in his concurring opinion said:

> "Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted. The invention to justify a patent had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge. That is why through the years the opinions of the Court commonly have taken 'inventive genius' as the test. It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance."

ferred to, it is said has "no place in the Constitutional scheme of advancing scientific knowledge."

The slight factual differences between this case and *The Great Atlantic & Pacific Tea Company* case do not distinguish the two cases and therefore makes applicable the same rule.

In *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, 87 U. S. P. Q. 303, this Court has made the following statement which is especially applicable here:

> "Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

And so, in the case at bar, the patentee Nudelman by merely forming an otherwise old device to simulate a living creature to attract the attention of a child and interest it in eating food, has added nothing to the total stock of knowledge but, as before stated, has merely exercised the skill of an artisan.

Long prior to the *Cuno* case, *supra*, this Court in *Hill* v. *Wooster*, 132 U. S. 693, at 700, laid down the rule that:

> "• • • it is not enough that a thing shall be new, in the sense that *in the shape or form in which it is*

produced, it shall not have been before known and that it shall be useful, but it must, under the Constitution and Statutes, amount to an invention or discovery."*

When the criteria of invention as announced by this Court in the *Cuno* case, *supra*, and *The Great Atlantic & Pacific Tea Company* case, *supra*, are applied to the claims in issue, the conclusion is inevitable that what the patentee Nudelman of the patent in suit did, did not constitute a patentable invention as contemplated by the Patent Statutes and the above referred to decisions of this Court.

CONCLUSION.

For reasons herein set forth and under the authorities stated, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed and the case remanded to the District Court for the Northern District of Illinois, with instructions to dismiss the complaint.

Respectfully submitted,

CREST SPECIALTY (Not Inc.),
Petitioner.

By CLARENCE E. THREEDY,
Its Attorney.

Chicago, Illinois,
March 12, 1951.

* The cases on this subject are collected in *Thompson* v. *Boisselier*, 114 U. S. 1, 11, 12.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (*Not* INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the District Court (Hon. Michael L. Igoe, District Judge, R. 111-118)* are reported in 89 F. Supp. 199.

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* References in this brief will be abbreviated as follows:
Transcript of Record—"R. ....."
Finding of Fact—"F. F. ....."
Petition for Certiorari—"Pet. ....."
Brief for Petitioner—"Pet. Br. ....."

The opinion of the Court of Appeals for the Seventh Circuit (R. 188) was prepared by the Honorable Walter C. Lindley, Circuit Judge, and was concurred in by the Honorable Otto Kerner and F. Ryan Duffy, Circuit Judges; it is reported in 184 F. 2d 577.

JURISDICTION.

The judgment of the Court of Appeals was rendered on October 16, 1950 (R. 188). The petition for a writ of certiorari was filed on December 8, 1950, and was allowed on February 26, 1951 (R. 198).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

This is an ordinary patent infringement action in which the courts below unanimously concurred in holding that claims 2 and 3 of Nudelman patent No. 2,455,266, issued November 30, 1948, for a "Children's Amusement Device," are valid and have been infringed by petitioner.

Petitioner did not raise any question in the petition for certiorari with respect to infringement (*cf. Crown Cork & Seal Co.* v. *Gutmann Co.*, 304 U. S. 159, 161; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179), and, therefore, the only question now before the Court is:

Are claims 2 and 3 of Nudelman patent No. 2,455,266 valid?

STATEMENT.

Petitioner's "Statement of the Case" reflects only the view of the facts which was advanced unsuccessfully in the courts below and wholly ignores the findings of fact made by the trial court and concurred in by the Court of Appeals. We accordingly briefly restate the case:

This action was brought by respondents in the United States District Court for the Northern District of Illinois to enjoin infringement of Nudelman patent No. 2,455,266, issued November 30, 1948, for a "Children's Amusement Device" (R. 132), and to recover damages occasioned by petitioner's infringement (R. 2-6).

The device of the Nudelman patent may be described simply as one which provides stimulation for children of tender years to eat. As found by the trial court, Nudelman's device is "an 'eating' table companion" for young children which "serves to encourage and educate them to eat" (F. F. 4, R. 111). It is a figure constructed to simulate a living animal—one readily comprehensible by a child and on his level of perception. It is adapted to be perched at the outside of a child's feeding bowl and has structural means "whereby the device can be fed and the food returned to the bowl" (R. 133, col. 1, ll. 8-12). The device creates the illusion that the little animal figure is actually eating and swallowing, and accomplishes the object for which it was intended by stimulating a child to follow the "eating" companion's example; that is, to mimic the animal's action and hence itself to take food and eat. The concept of this device was found to be new and inventive (F. F. 5, 6, R. 112). Nudelman's patented device is not merely a toy, but, as the trial court found, it is "highly utilitarian in character and has decided educational and psychological value" (F. F. 4, R. 111).*

* Nudelman's device is exemplified commercially by Plaintiffs' Exhibits 3 and 4. It is fully described in Finding No. 4 (R. 111-112) and in the opinion of the Court of Appeals (R. 188-189).

Claims 2 and 3 are in suit. They describe the necessary parts of the animal figure and the manner in which they are adapted to cooperate with a feeding bowl. *A feeding bowl is of course old in the art and is not included in the claims, which are confined to Nudelman's new structure.* This is admitted by petitioner (Pet. Br. p. 4).

It was admitted by Ben. B. Manaster, one of the partners of petitioner, that the infringing device "was copied from the device of the plaintiffs" (F. F. 11, R. 113-114). Indeed, after learning of Nudelman's device, Manaster applied for and obtained a "subsidiary and tributary" patent which covers only a specific type of head connecting means (F. F. 12, R. 114). Petitioner has labeled its infringing device as the "recognized new idea that makes children willing eaters" and has advertised it as an "unusual" item—sparked with "cleverness, color and imagination" (F. F. 10, R. 113).

On the trial, petitioner, nonetheless, sought to prove that Nudelman was anticipated by Smith patent No. 2,207,417 dated July 9, 1940, entitled "Cereal Bowl" (R. 170-172) and relied on it and various other patents to show want of invention as well. Petitioner called as an "expert" witness a patent attorney (R. 35-36) who produced the chart Defendants' Exhibit 2, which appears opposite page of the Brief for Petitioner and, using it to illustrate his testimony, asserted that Smith "completely anticipates" Nudelman (R. 37, 38-41).

The trial court found that Nudelman was new—not anticipated by Smith (F. F. 15, R. 115). In that connection the testimony of petitioner's expert (and with it, of course his chart) dealing with Smith was rejected as "lacking in verity" (F. F. 15(e), R. 116). Nudelman's device was found to be "unique," "ingenious" and a "genuine improvement" over the prior art (F. F. 10, R. 113), and on all the evidence the trial court found that the "concep

tion and production of a device like that shown and described in the Nudelman patent in suit was beyond the skill of a mechanic, and required the exercise of inventive genius" (F. F. 17, R. 117).

The Court of Appeals concurred in the trial court's appraisal of the Nudelman patent and in the rejection of Smith and the other "so far afield" references. Convinced by its own "careful examination of the evidence" that the trial court's findings were justified by "adequate substantial evidence," the court below affirmed the judgment of the District Court (R. 190, 191).

The case is here on a writ of certiorari to review the opinion of the court below upholding the validity of the Nudelman patent.

SUMMARY OF ARGUMENT.

I. Claims 2 and 3 of Nudelman's patent are valid on the facts of this case and under applicable rules of law. Each of the three prerequisites to patentability, *i. e.*, novelty, utility, and invention, is fully established by substantial, credible evidence.

(a) Nudelman's device is "new". It is the first structure providing a child's "eating" table companion to which food may be fed to encourage the child in turn to eat. It is not anticipated by the Smith patent because the partitioned cereal bowl of that patent is utterly unlike Nudelman in structure, has an object in view which is entirely different from that of Nudelman, employs an antithetical operation, and is used under radically different conditions. There is no hint or suggestion in Smith of Nudelman's conception, structure, or mode of operation. What might result from a redesign of Smith's hopper and a relocation of essential parts in the light of Nudelman

is not a valid basis for anticipation. The testimony that Smith's structure anticipated that of Nudelman was rejected by the trial court as "lacking in verity," and petitioner's expert conceded that the statement in Smith's patent of a child's possible interest in its operation was not a suggestion of the Nudelman patent or a teaching of stimulating children to eat by the psychology of mimicry.

(b) Nudelman's device is "useful". There are no degrees of utility under either the Constitution or the patent statutes. Any improvement is a useful one so long as it is capable of performing some beneficial function claimed for it. Nudelman's device meets the tests of utility since it provides a device which some members of society find of benefit on the *level of living*. The evidence overwhelmingly supports the trial court's finding that Nudelman's device is "highly utilitarian," having "decided educational and psychological value." There are no countervailing proofs.

(c) Invention, not mere mechanical skill, was exercised by Nudelman. His concept was brand new. He was the first to apply the principle of mimicry to the problem of infant feeding by the use of a particular, novel, physical structure. Nudelman's device was the first device of its character to aid in the solution of the infants' feeding problem. Nudelman departed from all prior attacks on the problem, attacks which were "abortive" attempts and "fundamentally and basically quite different." The factual historical background is covered by unchallenged findings showing that there was a substantial demand for a device to solve a long-standing problem. That was solved, and a long-felt want was filled, by Nudelman with a device which the trial court found to be unique, ingenious, and a genuine improvement. Petitioner's infringement is sincerest flattery; it admits that the infringing device, copied from Nudelman, is "unusual" and sparked with "cleverness, color and imagination." Petitioner's argument that

form and shape cannot contribute to patentability ignores the functional importance in the Nudelman device of the animal form and the movable head. Unless the device takes on a recognizable form and is able to simulate the feeding process, *i. e.*, have body, head, and mouth, the whole objective fails. Similarly, petitioner's arguments that the rules of *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, and *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, require an *a priori* holding of no invention must be rejected. The case at bar is a wholly different one. Here was a new concept, and the device of the patent is not plainly indicated by the prior art; it is not made up of old elements, each performing its old function in the same old way, as was true of the patented devices in the *Cuno* and *A. & P.* cases.

II. The *Cuno* case (314 U. S. 84) did not establish a new, higher, or more exacting, standard of invention. In that case this Court did not, by the use of the phrase "flash of creative genius," intend to do otherwise than reaffirm the *Hotchkiss* case, 11 How. 248, with its classic test of invention, *i. e.*, that "more ingenuity must be involved than the work of a mechanic skilled in the art." The decisions of the court below only rejected false interpretations of the *Cuno* case as having announced a new and more exacting standard of invention than previously existed; they have not departed from this Court's decisions. In *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, 132 F. 2d 812, the court below fully recognized the classic distinction between invention and mechanical skill. It held that the standard of invention had not changed, but that what had happened was that the test of inventive genius had become more exacting as the aptitude of him whom we call the mechanic was raised. In *Sinclair Co.* v. *Interchemical Corp.*, 325 U. S. 327, this Court in effect agreed with the view expressed in the *Burnside* case that we look to the

fact of accomplishment,—to the quality of the product, and not to the quality of the inventor's mind.

III. Under the provisions of Rule 52(a) F. R. C. P. and the applicable decisions of this Court, the unanimous and concurrent findings of fact of the courts below may not be set aside unless clearly erroneous. The questions of "anticipation" and "invention versus mechanical skill" are questions of fact. A trial court's findings on these matters, especially after balancing credibility, persuasiveness, and weight of evidence, are, "unless clearly erroneous," as conclusive on appeal as is the verdict of a jury.

ARGUMENT.

I.

CLAIMS 2 AND 3 OF NUDELMAN'S PATENT ARE VALID ON THE FACTS OF THIS CASE AND UNDER [illegible] RULES OF LAW.

The three prerequisites to patentability under the patent statute, 35 U. S. C. § 31, Appendix, *post*, p. 53, are (a) novelty, (b) utility, and (c) the attribute of invention. Each exists in the case at bar, being established by substantial evidence under a proper application of the controlling rules of law, as we now show:

The Nudelman Device Is "New"; It Is Not Anticipated by the Smith, or Any Other, Patent or Device.—A patented device is "new," that is to say, "not anticipated," within the meaning of the patent statutes, if it was not known or used in this country prior to the patentee's invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof. 35 U. S. C. § 31.

The defense of lack of statutory novelty,* *i. e.*, "anticipation," involves a comparison of the prior device (or its description and drawings, if patented) with the device of the patent in suit, and it is well settled that in order for a prior patent to constitute an "anticipation" in patent

* The distinction between "statutory novelty" as we treat it in this section and the phrase "patentable novelty" is important and should not be overlooked. The latter phrase is sometimes used as a synonym for "patentability" and really involves consideration of all of the statutory prerequisites, *i. e.*, novelty, utility and invention. On the other hand, statutory "novelty" means only newness (Walker on Patents (Deller's Ed.), pp. 254, 255, § 47; *cf. Collar Co.* v. *Van Dusen*, 23 Wall. 530; *Boston Pencil Co.* v. *Automatic Pencil Sharpener Co.* (2 Cir.), 276 Fed. 910, 912).

law, it must disclose a complete and operative device substantially identical with that of the patent in suit. *Seymour* v. *Osborne*, 11 Wall. 516; *Coffin* v. *Ogden*, 18 Wall. 120; *The Cawood Patent Case*, 94 U. S. 695, 703; *Bates* v. *Coe*, 98 U. S. 31, 48; *Imhaeuser* v. *Buerk*, 101 U. S. 647, 660; *Eames* v. *Andrews*, 122 U. S. 40, 66. Thus, devices are not identical in substance if, having different structures, they accomplish substantially different results or perform different functions. *Seymour* v. *Osborne*, 11 Wall. 516; *Consolidated Valve Co.* v. *Crosby Valve Co.*, 113 U. S. 157, 171; *Consolidated Roller Mill Co.* v. *Walker*, 138 U. S. 124; *cf. Union Paper-Bag Machine Co.* v. *Murphy*, 97 U. S. 120, 125.

A prior device, consequently, cannot serve as an anticipation negativing novelty unless it performs substantially the same function or office in substantially the same way and produces substantially the same result as the device of the patent in suit; and these requirements are not satisfied by a prior device which might by modification be made to accomplish the function performed by the device of the patent in suit if it was not designed by its maker, nor adapted, nor actually used, for the performance of that function. *Clough* v. *Barker*, 106 U. S. 166, 175-176; *Topliff* v. *Topliff*, 145 U. S. 156, 161; *Block* v. *Nathan Anklet Co.* (2 Cir.), 9 F. 2d 311, 312; *Gordon Form Lathe Co.* v. *Walcott Mach. Co.* (6 Cir.), 32 F. 2d 55, 58. Neither may prior art patents be extended beyond their fair meaning, for they are evidence of the prior art only as to what they disclose on their face. *Naylor* v. *Alsop* (8 Cir.), 168 Fed. 911, 920. They must be viewed "without assistance from the patent" in suit. *Cohn* v. *United States Corset Co.*, 93 U. S. 366, 370. They cannot be reconstructed in its light and then used as anticipations. *Downton* v. *Yeager Milling Co.*, 108 U. S. 466, 471; *Eames* v. *Andrews*, 122 U. S. 40, 66; *Skelly Oil Co.* v. *Universal Oil Products Co.* (3 Cir.), 31 F. 2d 427, 431.

SMITH PRIOR ART PATENT NO. 2, 207, 417 (R. 170)

OBJECT: To provide a cereal bowl with two compartments, one compartment for storing and loading dry cereals and the other compartment for receiving milk or cream, the sole purpose being *to avoid intermingling of the cereal with the milk, thereby to maintain the cereal crisp and prevent it from becoming soggy.* The Smith device may be in the form of a single bowl with a dividing partition and an opening in the bottom of the partition (Figs. 1, 2 and 3 of Smith) or it may be formed in two parts, one a bowl and the other a storage bin or hopper inserted *within the bowl* (Fig. 4 of Smith) i.e , "a bowl within a bowl."

Fig. 3

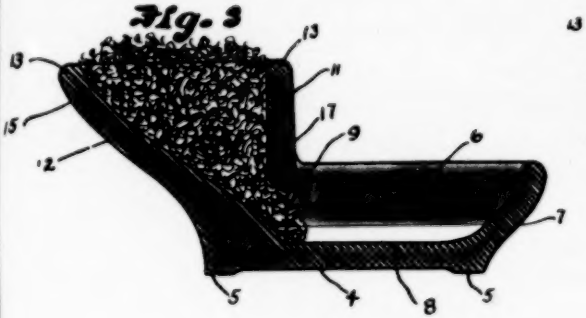
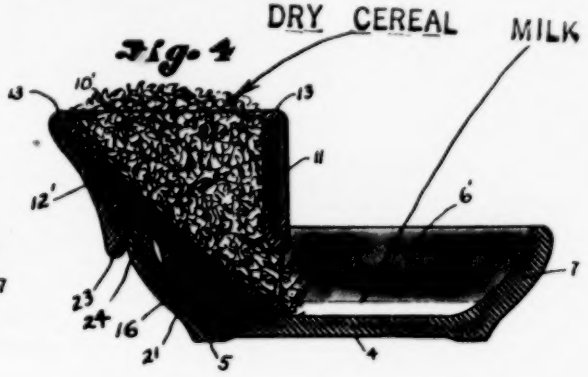


Fig. 4



STRUCTURE:

A device of abstract form having no particular character, such as would stimulate a child to eat.

May be either one bowl partitioned into two chambers (Figs. 1-3) or storage bin within a bowl (Fig. 4).

Storage bin fits *entirely within and rests on bottom of bowl.* Bin has a *bottom extending from one wall to other* and underlying the top opening.

Side outlet opening at bottom of bin.

Never intended that moistened child's food from bowl should be passed through bin, since bin is intended to be initially *filled and loaded with dry cereal.*

Form and position of bottom wall of bin and side outlet will not permit moistened child's food to pass freely through bin, since it would adhere to walls of bin and block the side outlet.

NUDELMAN PATENT IN SUIT NO. 2, 455, 266 (R. 132)

OBJECT: To provide a stimulant for children to eat and to encourage the development of correct feeding habits; to provide an *educational device based on an entirely new concept in child feeding, employing the psychological mechanism of mimicry* by embodying the device in a figure with a movable head simulating a living creature comprehensible to a child to serve as a *"table eating companion"* for the child, suggesting that the figure is actually eating and swallowing, the figure being so constructed that it may be "fed" by the child or its mother, simultaneously with the feeding of the child, with the same food, from the same bowl and with the same spoon, *the food being returned to bowl* through the "eating companion" device.

STRUCTURE:

A readily identifiable figure having a body and movable head comprehensible to a child.
Entire unit *fits adjacent exterior of bowl.*
Only simulated mouth and passage *extends over top rim of bowl.*
Capacity of bowl not reduced. *Short straight downward passage terminates near top of bowl.*
Food passes *freely, immediately and directly through short passage back into bowl from whence it originally came.*
Movable head covers and uncovers simulated mouth to suggest eating and swallowing.

Tested by the foregoing legal principles, the Nudelman device—utterly unlike Smith in structure and diametrically opposed in purpose and function—was clearly "new." It was not anticipated by Smith, either alone or combined with parts or elements from the other prior patent references.

We have prepared and insert opposite this page a chart which graphically depicts the absence in Smith of Nudelman's new structure and inventive concept. The chart consists of enlargements of Figures 3 and 4 of Smith's prior patent (R. 170) and a perspective view of the Nudelman device. In each, we have endeavored to show the intended operation.

A mere examination of the illustrations, particularly Figure 4 of Smith, showing the device on which petitioner relies, discloses why, on the argument in the court below, Judge Duffy aptly termed it a "bowl within a bowl" and why it *is unlike Nudelman in structure and diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his (F. F. 15, R. 115-116).*

Smith's Figure 4 device may be briefly described as consisting of a bowl having a detached hopper or storage bin positioned inside for separating the cereal and milk. The hopper or bin is between one-third to one-half of the size of the bowl and is placed inside and within the bowl, nesting on its bottom, and correspondingly reducing the capacity and size thereof. The hopper has an angularly inclined wall which extends the full height of the bowl and slopes from one side wall to the opposite side wall of the hopper, thereby forming the bottom or floor of the hopper. The bin has a side opening leading laterally into the bowl. The opening or passage is at the lowermost portion of the hopper and is thus very closely adjacent the bottom of the bowl.

It was the intention of Smith that the hopper should be filled with cereal in the same manner as a storage bin and that the milk should be poured into the bowl. The hopper thus merely serves to separate and keep the cereal from contacting the milk so that the cereal is maintained in a crisp condition until eaten. In eating, the spoon is placed adjacent the side bottom passage to gather the dry cereal that emerges from the bin in measured quantities, the spoon simultaneously taking up some of the milk in the bowl. The user thus eats cereal which is only momentarily saturated with the milk in the spoon.

Petitioner does not contend that the one-piece device shown in Figure 3 of Smith's patent anticipates Nudelman. This destroys petitioner's case, based on Smith, since the device of Figure 4 is the same device as that of the other figure, save that it is constructed in two pieces. Figure 3 is the full equivalent of Figure 4—the identical thing performing the same function in the same way to produce the same result. From Smith's patent (R. 172, col. 1, l. 31, *et seq.*) it appears that the device of Figure 4 is similar in all respects to that shown in Figure 3 except that the hopper is *detachable to facilitate cleaning the dish.* If the device of Figure 3 is not the same as Nudelman, and we think this is conceded, then by what strange process of reasoning can it be said that its twin (Fig. 4) is the same as Nudelman?

While it is true that Smith stated that a child eating cereal would be interested in the movement of the cereal from the hopper into the bowl (R. 171), *it was conceded* (R. 52, 62) *by petitioner's expert that the passage from the Smith patent, quoted at page 9 of the Brief for Petitioner, did not "suggest" the Nudelman patent* (R. 52) *and that he was unable to find in the Smith patent "any teaching to stimulate and encourage infants to eat by*

reason of psychology and mimicry" (R. 52, 62).* Smith's hopper is a geometric form having no life-like characteristic comprehensible at the level of a child's perception which would encourage him in the feeding process. If anything, Smith's device would be psychologically bad for the child to watch during feeding, as was the practice of distracting the child from its food by the mother telling stories and playing with extraneous toys in attempting to hold the child's interest during feeding. The child's attention is drawn away from the food and the eating process.

The avowed purpose of Smith, repeatedly stressed in the patent, is to maintain precooked dry cereals in the hopper or bin *separated* from the milk and thereby to maintain original crispness and to aid digestion by more intensive mastication of food (R. 171, col. 1, ll. 3-25). Thus, Smith's hopper lacks Nudelman's inventive concept; it was not designed or intended to perform the function of Nudelman's device. Smith's object was to store cereals in the hopper, whereas Nudelman's *inventive concept and his operative principle* involve an operation in which *the child's food is taken from the bowl, fed to an animal figure positioned adjacent to but outside the rim of the bowl, and returned to the bowl*, through a simulated mouth and short passage in the forwardly projecting portion of the animal figure, means being also provided to maintain the mouth and passage over the bowl. Petitioner's expert admitted that it is contrary to Smith's express teachings to take spoonfuls of mixed cereal and milk from the bowl and put them back into Smith's hopper (R. 52, 62).** He

* All emphasis in quotations added, except where otherwise indicated.

** Snow, R. p. 62:

"Q. I want to ask you this, is it not contrary to Smith's express teaching to return the mixed cream or milk and cereal to the hopper portion?

"A. Yes."

also admitted that there is no suggestion or hint in the Smith patent of such an operation (R. 52).*

Thus, clearly, from the mouth of petitioner's own expert, it was established that *Smith's device lacked Nudelman's inventive concept and was entirely different from that of Nudelman.* The trial court was, therefore, fully justified in finding that Smith's device was "used under radically different conditions to perform a function quite different from that of the Nudelman device, and it employs an antithetical principle of operation" (F. F. 15(b), R. 116).

Petitioner contends (Pet. Br., pp. 9-10), as it did in the courts below, that Smith "like the Nudelman patent in suit, discloses a passage which, like that of the claimed device, leads to and discharges into a bowl, thus enabling a mother, while using the Smith device in the feeding of a child, to take a spoonful of the contents of the bowl and deposit the same into the passage for gravitation back into the bowl."

This is sheer nonsense and hindsight carried to the extreme. Petitioner's expert admitted that it is contrary to Smith's teachings to use his device in the manner now asserted by petitioner. Furthermore, there is no conceivable reason why anyone (unless he had been so taught by Nudelman) should desire to fill Smith's bowl with mixed cereal and cream and then spoonful by spoonful deposit the cereal into the hopper. Not only is it impossible for Smith to be so operated,** but also that is not what Smith intended. In any event nothing would be

* A case which is made out by cross-examination of an opposing witness is, indeed, a strong one. *Eibel Process Co.* v. *Minnesota Paper Co.*, 261 U. S. 45, 53.

** A demonstration performed in court by petitioner's expert showed his model of Smith to be inoperative, at least for one type of dry cereal, when employed *a la* Nudelman (R. 52-53, *vide* F. F. 15(c), R. 116).

accomplished. The eating process would not have been simulated in accordance with Nudelman's teaching; nor would the child be able to see the food exit from the passage at the bottom of the hopper, which was the operation that Smith thought a child would be interested in. Thus, even if Smith could be operated as suggested by petitioner, the alleged interest-holding feature would be vitiated, and the passage in the patent which petitioner has so enthusiastically lauded (Pet. Br., p. 9) loses all of its possible relevancy.

The trouble with petitioner's contention is, as Mr. Justice Blatchford said of the alleged "anticipation" in *Clough* v. *Barker*, 106 U. S. 166, 176:

> "* * * The structure was not designed for the same purpose as Clough's, no person looking at it or using it would understand that it was to be used in the way Clough's is used, and it is not shown to have been really used and operated in that way."

In order to make Smith operate like Nudelman, as petitioner so baldly assumes, it would be necessary, first, to add a lifelike figure through whose mouth the food could be entered into the hopper, and second, to raise the exit passage of the hopper so that it would not be submerged in the bowl contents.* This would be to redesign and re-

* Even such a modification does not meet the complete Nudelman concept. As so modified, Smith has been converted into a figure standing inside the bowl, and when the food is introduced to the bowl the figure is hence standing partially immersed,—a poor example of proper feeding conditions. What remains to be done, therefore, is to relocate the entire body so that it is positioned adjacent the exterior of the bowl. In making all these changes, Smith has been completely destroyed, and Nudelman, on the other hand, has been transplanted in Smith. It is as plain as it can be that without any knowledge of Nudelman's device, no one could possibly see the Nudelman concept in Smith or even know where to begin to convert Smith into anything like Nudelman. These are reasons why, *inter alia*, as discussed, *post*, pp. 30-35, more than mere mechanical skill was involved in the production of the Nudelman device over Smith.

locate essential parts of the hopper as well as to impose new and different functions upon those parts—in short, to employ them in a manner never contemplated by, and indeed, inconsistent with, Smith's express disclosure. In *Block* v. *Nathan* (2 Cir.), 9 F. 2d 311, 312, Judge Learned Hand said:

> "* * * If any one had reversed it [the prior art structure], he would have perverted it from its plainly intended position; the design of the combination would have cried out against it. An earlier device which must be distorted from its obvious design cannot be an anticipation."

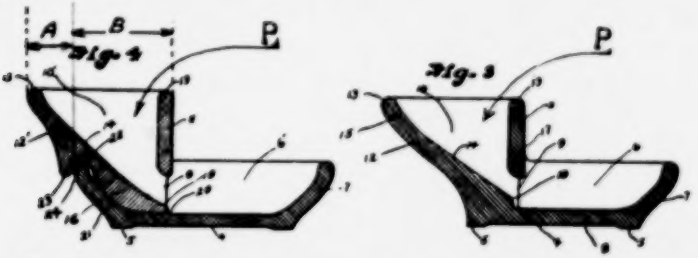
Prior patents cannot be reconstructed in the light of the invention in suit and then used as a part of the prior art.

Defendants' Exhibit 2 Is an Unreasonable and Distorted Application of the Claim Language.—In asserting, on the basis of Defendants' Exhibit No. 2 (Pet. Br., p. 9), that "without exception, every element of typical claim 2 in issue is found, in the same relationship with respect to each other, in the Smith patent," *petitioner is pressing upon this Court the testimony of its expert which the trial court rejected as unworthy of credit* (F.F. 15(e), R. 116-117, *ante*, p. 4).

Petitioner, referring to the chart, says that "identity" is "crystal clear." But this chart is an illusion; it is no more than wishful thinking. It treats the words of Nudelman's claims as though they existed *in vacuo* and uses them out of context, with an utter disregard of the meaning which the law always requires, *i. e.*, that derived in the light of the Nudelman patent specifications (*Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211, 217).

According to petitioner's chart, the parts 12′ and 23 of Smith's hopper represent "a body portion" called for in Nudelman's claims, and the part 16 the forwardly ex-

tending portion. We here reproduce the two devices of the Smith patent with a red dividing line added to Figure 4 to illustrate the complete absurdity of petitioner's position.



Credulity is taxed beyond the breaking point by the contention so dramatically shown by the foregoing illustration to be absurdly erroneous, *viz.*, that the small part of Smith's hopper indicated by "A" may be said to be the main, central and principal portion of the hopper and that the considerably larger part indicated by "B" constitutes only a mere appendage thereto. *This is one of the reasons why Judge Igoe rejected the testimony of petitioner's expert as being "lacking in verity" and an "unreasonable distortion of the language of the claim"* (F.F. 15(e), R. 116-117).

According to Nudelman's disclosure, the "body portion" called for in Nudelman's claim, and which is required to be *placed adjacent the exterior of the bowl*, is the body 10 of Nudelman's figure. This is the *main, central, and principal* portion of the animal, and is necessarily so not only in the light of the disclosure, but in accordance with ordinary dictionary definition as well.* From Nudelman's main body portion, the auxiliary or smaller portion, which

* Webster's New International Dictionary defines "body" *inter alia* as "The trunk, or main part (esp. of a person, animal, or plant), as distinguished from the limbs and the head; the main, central, or principal part, as of a tree, army, country, structure, building, etc."

forms the simulated mouth of the figure, projects inwardly or over the bowl and overlies only the top of the bowl.

Another ridiculous and fundamentally erroneous "mere word application" made upon petitioner's chart is that relating to the "passage" called for in Nudelman's claims. According to the Nudelman patent disclosure and drawings, the passage "extending solely downward" from the mouth is not in, or a part of, the main body portion. Nudelman's passage is *short* and *terminates adjacent the top rim of the bowl.* This is essential to carry out Nudelman's concept and functions. Petitioner shuts its eyes to this fact and seeks to use the cubical interior of Smith's hopper, designated by "P," as such a passage. But this interior is the space intended and designed for the storage and confinement of the dry cereal; it is not Smith's passage. Smith's bottom passage is found at 9 and 19, not at P. It is a lateral passage. It is at the side of Smith's hopper and its axis is parallel to the base of the bowl. It terminates *adjacent the bottom of Smith's bowl.*

Moreover, the axis of the short Nudelman vertical passage which *terminates adjacent the top or rim of the bowl is at right angles to the base of the bowl* and thus permits baby food of mush-like consistency—semi-solids—to fall directly from the top outlet of the passage into the bowl without adhering to the sides of the passage and without clogging it. In Smith, the under-wall of the bin P slopes laterally from one side of the bin completely across to the other side, thus forming a bottom or floor for the bin directly under the top cavity. If, contrary to Smith's teachings and purpose, one took food from the bowl and dumped it into the Smith hopper, the food would not pass through the Smith hopper. It would stay in the hopper. This sloping under-wall, extending from one side wall to the other, is in keeping with Smith's desire to handle dry cereals and retain them dry. These only gravitate from

the passage in measured quantities as the spoon scoops away the pile adjacent the side outlet. But if mush-like food or wetted cereal which constitutes the child's diet is dropped into Smith's bin, it will adhere to the sloping bottom wall and eventually block the passage into the bowl; see F.F. 15 (c), R. 116.

Nudelman's inventive concept is fundamentally and basically new and is diametrically opposed to Smith's. Nudelman does not want to separate two foods. His purpose is to provide a "table companion" that "eats" with the child, that utilizes the psychological process of mimicry in stimulating a child to eat, and that teaches the child proper feeding habits. Nudelman's disclosed operative principle requires the body portion, formed to simulate a living creature, to be *outside the bowl.* It requires the auxiliary or projecting portion simulating the mouth to *overlie* and *overhang* the bowl, and the "solely downward" extending passageway is found only in the projecting portion; it is a short passageway and terminates closely adjacent the *top rim of the bowl. The Smith patent does not show this structure.*

The tabulation appearing upon the succeeding page consists of a serialized breakdown of claim 3 of the Nudelman patent (R. 133-134) and quite clearly shows that the device of that claim, as represented by the elements specified (properly interpreted in the light of the specification), is not found in Smith or in the other patents mentioned in Petitioner's Brief, *i. e.,* Trosper patent No. 1,751,773 (R. 152) and Theodoropulos patent No. 1,792,129 (R. 158) *or in any combination thereof.*

Nudelman Claim 3*	Whether Claim Elements Are Present		
	Smith	Trosper	Theodoropulos
An amusement device comprising	Maybe	Yes	No
(1) a figure formed to simulate a living creature,	No	Yes	Yes
(2) said figure comprising a body portion adapted to be placed adjacent the exterior of a feeding bowl,	No	No	No
(3) said body portion having a forwardly extending portion adapted to extend closely adjacent to and overlie a portion only of said bowl,	No	No	No
(4) said forwardly extending portion having a simulated mouth and a passage,	No	No	No
(5) said passage having walls extending solely downward from said mouth through said forwardly extending portion, and	No	No	No
(6) a head secured adjacent said forwardly extending portion,	No	Yes (head only)	Yes (head only)
(7) and movable to permit the contents of a spoon to be emptied into said simulated mouth and fall by gravity into said feeding bowl,	No	No	No
(8) said forwardly extending portion including means preventing lateral movement of said passage from over said bowl.	No**	No	No

Clearly there is no anticipation. If the claim literally construed could be read upon Smith, it would cease to represent Nudelman's actual invention. *Cf. Westinghouse* v. *Boyden Brake Co.*, 170 U. S. 537, 568.

It is submitted that novelty in Nudelman's device is not negatived and that the findings to that effect in the courts below are clearly correct and in accordance with the evidence.

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* This claim covers explicitly the form shown in Figures 1 to 4 of Nudelman's patent and the commercial embodiment. Claim 2 is a broader claim in that it omits the movable head element. Petitioner likes to use the modified form of Figure 5 of Nudelman's patent because it has an immovable head, and claim 2 because it does not include the movable head, in the vain hope that thereby it can come closer (?) to Smith. Nudelman's claim 2, however, is no more anticipated than claim 3 as is evident from the tabulation above shown.

** Smith shows a hooking means but since hopper and passage are within the bowl at all times, this claim element is not functionally met by Smith.

The Nudelman Device Is "Useful."—The constitutional motive for conferring on Congress the power to grant patents is the "promotion of the progress of science and *useful arts.*" Accordingly the patent statutes (35 U. S. C. § 31) require as a second prerequisite to patentability the attribute of utility.

An invention is "useful," as that term is used in the patent statutes, if it is capable of performing some beneficial function claimed for it. The constitutional standard is, as this Court has held, "to reward those who make some substantial discovery or invention, which adds to our knowledge and makes *a step in advance in the useful arts.*" *Atlantic Works* v. *Brady*, 107 U. S. 192, 200. The limited monopoly permitted by the Constitution is the inducement to evoke "disclosure of advances in knowledge *which will be beneficial to society.*" *Sinclair Co.* v. *Interchemical Corp.*, 325 U. S. 327, 331.

The word "useful" is, therefore, to be given a practical meaning. It was undeniably employed in contradistinction to "useless," "mischievous," "harmful," or "immoral." Any improvement which achieves a beneficial purpose for the good of society or is of some advantage theretofore not realized is a useful one. Whether great or small, it is of utility if an individual finds it of some help or benefit in his or her labors, or if it makes his or her life more livable; in other words, if it is, for society, a beneficial means to any end on the *level of living.*

In *Lowell* v. *Lewis* (C. C. Mass.), 15 Fed. Cas. 1018, 1019, No. 8,568, Mr. Justice Story, while on circuit, thus explained to a jury the legal significance of "useful" as found in the then patent statutes:

> "All that the law requires is, that the invention should not be frivolous or injurious to the well being, good policy, or sound morals of society. The word 'useful,' therefore, is incorporated into the act in contradistinction to mischievous or immoral. For in-

> stance, a new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention. But if the invention steers wide of these objections, whether it be more or less useful is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard."

Justice Story was rejecting the defendant's contentions, in that case, that the patentee was required to prove "general utility" for his pump and that it was not enough that "in some peculiar cases his invention might be applied with advantage."

There are, therefore, no *degrees* of utility under either the Constitution or the patent statutes. All that matters is that the improvement provide some possible benefit or advantage for society. It is not required to be a commercial success, or the best of its kind, or incapable of improvement. Neither is it required to supersede all other existing means of accomplishing the same object or to be a great scientific innovation. The patent statute requirement of being "useful" is satisfied if some members of the public feel that they have learned something from the improvement, or find some benefit or advantage therein on the *level of living.*

That Nudelman advanced the "useful arts," as the statute requires, is found in the psychological basis for his device which takes advantage of the mimetic tendency of the child and applies it to a practical purpose (F.F. 5, R. 112).

Writing "Tops for Today" in the *Chicago Sun-Times* of October 4, 1948, and the *Philadelphia Daily News* of October 21, 1948, Janet Windsor said (R. 74):

> "Do you have a 'reluctant Robert' in your home? A very junior member of the family who just won't eat

a thing unless he's wheedled into downing each bite?

"If every meal involves a battle with baby, you'll be glad to hear there's a new device on the market that should actually end these tiring sessions * * *.

"The whole idea of the set is based on baby's love for mimicry. The 'one for piggy, one for baby' trick is a simple but sound one. If the tot sees the little porky eating without complaint, he will do the same. What he doesn't know is that the food slides right through the pig and back into the bowl * * *.

"* * * Practical mothers won't want to miss this. * * *"

Mrs. Gladys Gerber, mother of two boys, one twenty months and another five years of age, testified in the case at bar of her approving use of the patented device. She had had quite a few feeding problems with her first child, but, in the case of her second child, "no feeding problem" existed because of this "wonderful thing." As to whether she had found the respondents' Hungry Piggy device "of help and useful" in feeding her youngest child, she said (R. 23):

"* * * he is eating the cereals better than the first one did, and that is all I can say, it occupies his interest."

In petitioner's own Manaster patent, the infringing device is said to have the "effect of inducing the child to alternately feed itself and the character, thus stimulating the child to consume its food" (R. 181, col. 1, ll. 13-16), and upon the carton in which the infringing device is sold petitioner proclaims that it is the "recognized new idea that makes children willing eaters" (Plaintiffs' Exhibit No. 2, see also F.F. 10, R. 113).

In addition to what petitioner thought of the Nudelman device, there has been public acceptance of it. Although the extent of petitioner's sales was not adduced on the trial, it appears that respondents' sales in the first year

of business amounted to 191,386 units (R. 68), representing a dollar volume in retail sales between $180,000.00 and $185,000.00 (R. 16).

In another sense, the general utility of the devices here involved appears from the affidavit filed in the Patent Office by petitioner's present counsel where, in speaking of the infringing device, he said (R. 95) that "the public will benefit by the expenditure of moneys necessary to the manufacturing and sale of said device and the resulting commerce * * * as well as the increased employment of labor" in its manufacture.

The fact of infringement likewise establishes utility, *Lehnbeuter* v. *Holthaus*, 105 U. S. 94, 95, and it does not even lie in the mouth of petitioner to deny or question utility, *Boyce* v. *Stewart-Warner Corp.* (2 Cir.), 220 Fed. 118, 126.

The trial court's finding that the device is "highly utilitarian" (F.F. 4, R. 111) is clearly correct.

The Conception and Production of the Nudelman Device Was Beyond the Skill of a Mechanic and Required the Exercise of Inventive Genius.—The third prerequisite to patentability is "invention."

Ever since *Hotchkiss* v. *Greenwood*, 11 How. 248, it has been consistently held that "novelty" and "utility" are not enough to support patentability; that, in addition, the patented improvement must have the quality of invention. This is both a constitutional and a statutory requirement, since the Constitution authorizes the granting of limited exclusive rights only to "inventors," and the statutory provisions expressly refer to a "new and useful" improvement which shall have been "invented."

However, there is neither a constitutional nor a statutory definition or standard of invention. At best, like "proximate cause" in the field of torts, "invention" is an elusive concept.

Passing for the moment the question of whether or not any special order or high degree of invention is required,* it has always been recognized that in order to constitute invention it is necessary that there be an exercise of the inventive or creative faculty. *Hotchkiss* v. *Greenwood, supra; Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59; *Thompson* v. *Boisselier*, 114 U. S. 1, 11-13. As was stated by Mr. Justice Jackson in *Sinclair Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330:

> "A long line of cases has held it to be an essential requirement for the validity of a patent that the subject-matter display 'invention,' 'more ingenuity * * * than the work of a mechanic skilled in the art'."

Thus, one thing of which we are certain is that invention may not reside in an improvement, however new and useful, which is the product of mere mechanical skill, representing a contribution which could have been made by those skilled in the art to which it relates merely by the routine exercise of that skill. *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 90-92.

It is not always easy to draw the line distinctly between inventive genius and mere mechanical skill. However, it may be safely said that the lowest order of invention is something more than mechanical skill, and the highest degree of mechanical skill is something less than invention. If the contribution was obvious or would readily occur to those skilled in the art to which it related, the inference to be drawn from the facts is that only mechanical skill was involved. *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 487. On the other hand, if those skilled in the art did not know how to achieve the result or solve the problem, in spite of a long-felt want, the inference

* In view of petitioner's charge that the court below has consistently rejected a so-called "flash of genius" test laid down by *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, we treat this point separately at *post*, p. 40.

from the facts is that more than the skill of the calling was required. *Loom Co.* v. *Higgins*, 105 U. S. 580, 591; *Krementz* v. *The S. Cottle Company*, 148 U. S. 556, 560; *Hobbs* v. *Beach*, 180 U. S. 383, 392; *Expanded Metal Co.* v. *Bradford*, 214 U. S. 366, 381; *Diamond Rubber Co.* v. *Consolidated Tire Co.*, 220 U. S. 428, 434-5; *Eibel Process Co.* v. *Minnesota Paper Co.*, 261 U. S. 45; *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 279.

Pursuing further the analogy from the field of torts, as negligence is less care than the reasonably prudent man under all of the attendant circumstances should exercise, so is invention more ingenuity, under the attendant circumstances, than a skilled mechanic would exercise. In each inquiry the trier of facts is required to set up a hypothetical person as an intellectual concept whereby to measure failure to exercise due care or failure to achieve invention. The test of due care may seem simpler, but that is so only because daily personal experiences enable the trier of facts to visualize reasonably prudent conduct subjectively. In testing invention, because personal experiences of the trier of facts in the particular field are usually wanting, an objective background whereby to measure invention must be established. Thus, the testimony of expert and fact witnesses is adduced to show the historic setting of the invention, and what is ordinarily to be expected of the skill of the artisan in the particular field, thereby supplying a standard for determining the fact of invention *vel non*. A necessary limitation on all such testimony is that it shall not be predicated on wisdom after the event. *Loom Co.* v. *Higgins*, 105 U. S. 580, 591.

Thus tested, Nudelman's device is seen to be the product of the inventive faculty and not of mere mechanical skill.

Nudelman's was a revolutionary concept. He was the first to perceive the merit of constructing a device which,

taking advantage of the psychological process of mimiery, could serve to encourage and educate infant children to eat. *This conception was new—a basically different approach to the problem.* Nothing like it had ever been suggested or even hinted at. The device was not merely a toy; it was a working tool for the training and education of children.

Nudelman's device was hence the "first device of its character" to aid in the solution of the long-standing infants' feeding problem (F. F. 5, 6, 7, R. 112); it was "unique," "ingenious," and a "genuine improvement" (F. F. 10, R. 113). Its revolutionary character flows from the fact that the prior means and devices (hereinafter described, *post*, pp. 28, 31) which sought to deal with the problem were "fundamentally and basically quite different" from Nudelman's patented device (F. F. 8, R. 113). As pointed out by the Court of Appeals, these devices were "*abortive attempts*" to solve the problem (R. 188).

The Need or Long-Felt Want.—The trial court found as a fact that the infants' feeding problem was a recognized one which had "existed for a long period of time" and that, prior to February 17, 1948 (when Nudelman's patent application was filed, R. 133), "there was a substantial demand for a device like that * * * in the Nudelman patent" (F. F. 7, 9, R. 112, 113).

Market conditions and the existence of a long-felt want or demand prior to 1948 for more satisfactory solutions of the vexing infant's feeding problem were proved, *inter alia*, through Sol Eliot, one of the partners of the petitioner. He testified (R. 24, 25) that he had been in this business for twenty years and was familiar during that period "with the items which were being offered as feeding accessories or feeding toys." Prior to July, 1948, when the petitioner's infringing device was introduced,

Eliot had personally checked the market to determine whether there would be acceptance for the device. Eliot's survey determined that there was "a substantial market" for the device (R. 90), and on the basis of this survey, petitioner concluded that the device merited a proposed initial investment of $55,000.00 (R. 25, 27, 93).

Dorothy Scharle, vice president and merchandise manager of Nat Gavender, Inc., purchasing representatives of a large group of specialty and department stores, testified that prior to the summer of 1948, no "psychological or utility toy" for use in connection with feeding children was available on the market (R. 22).

The Prior Attempts to Solve the Problem.—The prior efforts to deal with the feeding problem consisted, *inter alia*, of decorated drinking cups and knives and forks with handles simulating living creatures, or of dishes and so-called warming plates decorated with nursery figures (Scharle, R. 22).

L'Heureux patent No. 2,200,696, issued May 14, 1940, on an application filed October 11, 1938 (R. 166-168), shows and describes a "Child's Coaxer Dish" which had for its object the stimulation of a "child's interest in eating by providing his favorite comics, nursery rhymes, etc., in the bottom of the dish and which cannot be seen until his cereal or other foods are completely eaten" (R. 167, col. 1, ll. 5-10). The alleged improvement consisted of providing a transparent bottom in combination with a base which facilitated the mounting and substitution of different pictures, it being claimed by L'Heureux that the changes would maintain a child's interest and that by "rousing the child's curiosity as to what lies underneath, he will soon make a game of his eating" (R. 168, col. 1, ll. 10-12).

Ide patent No. 2,224,683, dated December 10, 1940,

entitled "Feeding Method and Article," also recognized the problem and dealt with it in much the same manner as did L'Heureux (R. 174-176).

It is evident that what had escaped the attention of these patentees who were working in this art was the fundamental cause of the problem. Solution did not rest either in merely holding the interest or in arousing the curiosity of the child. Rather, and this is why Nudelman was "fundamentally and basically quite different," it lay in providing a device utilizing the universal instinct of children for mimicry to induce concentration on the eating process and to create the desired behavior pattern. The evidence shows clearly, therefore, that Nudelman departed radically from the prior thinking of those who were giving their attention to providing means for dealing with the infants' feeding problem by appeals to curiosity and by diversions.

The Court of Appeals was clearly justified in characterizing the prior devices as "*abortive attempts*" to solve the infants' feeding problem (R. 188).

Petitioner's argument of no invention has three facets, *i. e.*, (a) that Nudelman's advance over Smith is merely to form his device to simulate a living creature, (b) that the *Cuno* case (314 U. S. 84) precludes a finding of invention, and (c) that the recent *A & P* case (340 U. S. 147) is indistinguishable from the case at bar and likewise precludes a finding of invention.

(a) Forming the Device of the Nudelman Patent in the Similitude of a Living Creature Was Not Mere Form But a Matter of Substance.—Petitioner's elaborate straw man argument based on "form" and "design" is erected upon a distortion by italicized emphasis of respondents' argument and Finding of Fact No. 6 (Pet. Br., p. 10). The trial court did not find that the essence of Nudelman's concept

was mere design or simulation of a living creature. It did find, not on the basis of a statement made in argument, but on the credible evidence, that it was of the essence of the concept that the device "simulate a living creature comprehensible to a child and have *body, head* and *mouth* so that food could *actually be fed* to it, thereby creating the illusion of eating * * *."

The "form" of Nudelman's device in the likeness of a living creature is not the "form" which is condemned in certain negative rules of patentability. Here Nudelman's shape was not an immaterial variation from prior devices. It was the vitalizing factor in the performance of a new function producing a beneficial result. It is essential to the purpose of the Nudelman structure that the device take the form of a living creature in order that the illusion of eating be created. Unless the structure takes on such a recognizable form, the whole objective fails and no useful purpose will be served.

We note that petitioner ignores the inclusion in claim 3 of a movable head to make the illusion of eating more perfect. Obviously a mere hopper of a geometric form with an *open cavity* like Smith's, and having no lifelike character comprehensible to a child, would not teach or encourage a child to eat by the psychological process of mimicry; it would not serve as a "table companion" which eats with the child. Nudelman's concept, therefore, envisioned and disclosed a structure with a definite form comprehensible to a child, namely, a figure formed to simulate a living creature; this creature must have a body and a head. The head may or may not be movable, but preferably it should be movable, for it then could completely cover the mouth opening and hide the passage from the child's view. It would be raised to uncover the mouth opening so that the food could be deposited therein and then closed again to cover the mouth opening, to simulate the effect of eating

and swallowing, thus cooperating with the other elements to accomplish the intended result.

Petitioner assumes its desired conclusion when it asserts (Pet. Br., pp. 10-11) that "Nudelman formed, *as taught by the prior art*,* such old device [of the Smith patent] to simulate a living creature, to attract the interest of a child and *to encourage it to eat by the so-called process of mimicry.*" This bald-faced statement is wholly unsupported by the record and refuted by the findings below. The prior art referred to in Finding of Fact No. 8 had nothing to do with encouraging a child to eat "by the so-called process of mimicry." Nor did Trosper patent No. 1,751,773 (R. 152) make the slightest reference to such a factor for encouraging eating by the child. Trosper relates to a toy or doll for a child to carry about and play with and shows a rubber pouch or sac positioned inside the body of the toy into which food may be dumped. The pouch retains the food and after it becomes filled the body of the toy may be opened, the pouch detached and removed, emptied and again replaced inside the body of the toy. This patent has no relationship to child feeding and is not directed to the objects of the Nudelman patent (F. F. 16, R. 117).

The Theodoropolous patent No. 1,792,129 (R. 158) relates to a combined umbrella holder and purse. It shows a figure of a bird with a cavity which is closed at the bottom and into which a collapsed umbrella may be inserted for transporting. Obviously, the patent has no pertinency whatever to child feeding.

The principle of the "coaxer dish" patents, also referred to by petitioner (Brief, p. 11) is, as we have previously shown, merely to interest the child in uncovering the comics, pictures or decorations at the bottom of the plate. No mimicry is involved in the use of such dishes.

* Emphasis added.

Despite petitioner's reckless statement, the fact is that Nudelman was the first patentee to disclose any device to encourage a child to eat by reason of the child's innate desire to imitate or mimic such action by others (F. F. 5, R. 112).

Nudelman's, therefore, is a basic and pioneer patent. The Nudelman invention is not merely an improvement, —doing something better, or by other means, than was done previously,—but rather it was fundamentally new. It introduced and utilized a new concept in child feeding, accomplishing something that was never accomplished before and by structure entirely new. Nudelman was the first to provide a structure which (a) utilized the process of mimicry in encouraging a child to eat, and (b) which formed an "eating" table companion for the child, which ate or was fed with the child from the same bowl and spoon and with the same food. None of the prior patents, individually or collectively, show the novel Nudelman concept, function, or structure.

(b) The Cuno Case Does Not Preclude a Finding of Invention.—In the petition for certiorari (p. 11) the question of invention of Nudelman over Smith was said to be controlled by the test of invention announced in the *Cuno* case, despite the fact that the prior art device is "diametrically opposed in purpose and function, having in view an object entirely different from Nudelman's and providing a function entirely foreign to his." No logical or rational demonstration whatever is offered in support of petitioner's position.

The Mead patent in the *Cuno* case was invalidated because (1) "wireless" or "cordless" lighters were old as shown by the prior Morris patent as well as by others (314 U. S. 86), and (2) his automatic or thermostatic control

was likewise old (pp. 88-89). Indeed, the prior Copeland device differed from Mead in some respects, but it was, nonetheless, an electric lighter with a thermostatic control and, hence, all that Mead had done was to use Morris' removable plug to establish the automatically controlled circuit of Copeland.

In the case at bar Nudelman's advance was not plainly indicated as was Mead's. The Smith patent does not compare at all with the prior Morris and Copeland patents in the *Cuno* case; they were not utterly unlike Mead; *they did not have purposes diametrically opposed to Mead's;* and they did not *provide functions entirely foreign* to Mead's. Thus, the *Cuno* case is not one which establishes a negative definition by which it may be ruled *a priori* that no invention is achieved by Nudelman over Smith in the case at bar.

There is no evidence, moreover, of any use for any purpose whatsoever of Smith's device. No one has given evidence that anyone ever regarded Smith as a solution of the feeding problem or even thought of using it in the manner suggested by petitioner (Pet. Br., pp. 9-10). The evidence is quite to the contrary, for petitioner's expert admitted that there is no hint or suggestion of such an operation in Smith and that it is contrary to Smith's express teachings to use his device in the manner of Nudelman (*ante*, p. 13).

Smith's application was filed in 1938 and the patent was published in 1940 (R. 171), and yet it taught the art absolutely nothing concerning utilitarian educational devices to aid in the feeding of children. The conclusion is inescapable that Smith fell far short of the mark and that he taught no one anything as to desirable results. The alleged invention apparently began and ended its uneventful career in 1938 when the application was filed. It was

"stillborn" and it seems to have occurred to no one that Smith's device offered any help in dealing with the problem until this lawsuit was tried and petitioner urged it as an anticipation. In 1948, ten years later, there was still a crying need for a satisfactory feeding device.

Even if it be assumed (contrary to the fact) that Smith's device could be adapted to perform Nudelman's function, that it was not in fact so adapted strongly indicates that the changes were not obvious and involved more than mechanical skill, *Consolidated Valve Co.* v. *Crosby Valve Co.*, 113 U. S. 157; *Potts* v. *Creager*, 155 U. S. 597; *Diamond Rubber Co.* v. *Consolidated Rubber Co.*, 220 U. S. 428; *Trabon Engineering Corp.* v. *Dirkes* (6 Cir.), 136 F. 2d 24.

In the *Consolidated* case, Mr. Justice Blatchford said (pp. 170-171):

> "* * * Taught by Richardson, and by the use of his apparatus, it is not difficult for skilled mechanics to take the prior structures and so arrange and use them as to produce more or less of the beneficial results first made known by Richardson; but, prior to 1866, though these old patents and their descriptions were accessible, no valve was made producing any such results."

But petitioner's present view of Smith is suspect; it is contrary to the opinion held prior to suit. Petitioner then thought Smith lacking in pertinency.* Smith's patent was found when petitioner made a patent search in connection with Eliot's survey of market conditions. However, Eliot admitted that notwithstanding Smith, petitioner proceeded to apply for its Manaster patent No. 2,453,922 (R. 180)

* Petitioner's prior characterization of the infringing device as "unusual" and "sparked with cleverness, color, and imagination" (F. F. 10, R. 113) was also "a frank and apparently a just tribute to the merits" of Nudelman (*cf. Potts* v. *Creager*, 155 U. S. 597, 610.

upon the infringing device. When petitioner's present counsel was petitioning the Patent Office to expedite the Manaster application, he, being then fully aware of the Smith patent, stated under oath (R. 94):

> "I * * * have caused to be made a careful and thorough search of said art * * * and that as a result of said search I believe that said claims define patentability over the prior art. * * *"

Dusted of its years of oblivion, the Smith device has become, according to petitioner and its counsel, "a crystal clear" anticipation of Nudelman and, of course, alleged justification for infringement!

Petitioner admittedly copied Nudelman, not Smith. Like the infringer in *Diamond Rubber Co.* v. *Consolidated Tire Co.*, 220 U. S. 428, 441, it "gives the tribute of its praise to [Smith]; it gives the [Nudelman device] the tribute of its imitation."

(c) This Court's Decision in the A & P Case is Inapplicable.—The case at bar is wholly different from the recent case of *A & P Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147.

In the *A & P* case the lower courts had perceived Turnbull's "invention only in an extension of the counter," each element of the combination having been explicitly found to be "known to prior art." The only thing which had been designated by the two lower courts as an invention had to be disallowed as a matter of law because (a) the extension was not mentioned in the claims except perhaps by a strained construction which ran afoul the claim clarity requirements of 38 U. S. C. § 33, (b) even if the extension were deemed adequately disclosed and claimed, it did not amount to invention merely to elongate a counter, and (c) even if the claims included the extension and it were conceded to be a patentable improvement, over-

claiming existed by reason of inclusion of old elements unless "together with its other old elements, the extension made up a new combination patentable as such."

Having thus determined that the fact finding as to invention could not stand as a matter of law, Mr. Justice Jackson nevertheless proceeded to determine whether the combination could survive on any other basis, nothing tangible being new, and the alleged invention existing "only in bringing old elements together." Under the negative rule of *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545, 549, the failure of the lower courts to find that the old elements of Turnbull's combination performed "any additional or different function in the combination" than they performed out of it, was fatal to the patent, and this Court concluded on the findings below that the improvement was not patentable. The judgment was accordingly reversed because the lower courts had not used the exacting standard of invention required "where a combination is made up entirely of old components."

In the case at bar, Nudelman's is not a combination made up entirely of old elements. Here we have something new which is tangible; invention was found to reside in the conception and production of the entire assembly—a device which performs a new function and achieves a beneficial result. Being in form and structure a personality on the level of a child's perception, (a) it may be perched at or near the feeding bowl and be fed with the same food as that fed the child and from the same bowl, the food being immediately returned to the bowl without waste, and (b) it creates the apparent appearance of a figure consuming food and by the psychological stimulus of mimicry serves to encourage and educate the child to follow the example of its "eating" table companion. This appears from the following explicit findings as to Nudelman's inventive concept (R. 112):

"5. The inventive concept of Nudelman is well grounded in psychology. It takes full advantage of the process of mimicry, which in the final analysis is the foundation of practically all methods of instruction employed for infant children. The Nudelman device was the first ever to teach the idea of providing an 'eating' table companion for a young child which utilizes the psychological process of mimicry in providing the companion to be fed either by the mother or the child itself simultaneously with the feeding of the child. The feeding of the table companion with the same food and from the same bowl and the apparent appearance of the animal consuming food provides a stimulant for the child to do likewise.

"6. It was of the essence of Nudelman's concept that the device, employed for the purpose of providing instruction and encouragement for the child, simulate a living creature comprehensible to a child, and have body, head, and mouth so that food could actually be fed to it, thereby creating the illusion of eating and thus stimulating, instructing, and encouraging the child to join the 'eating' table companion and to eat."

A device of the foregoing novel character solved a definite problem of long standing (F.F. 7, 8, 9, R. 112-113); it was not obvious and was found to be unique, ingenious, and a genuine improvement; accordingly the evidence fully supports the fact finding that the "conception and production of a device like that * * * in the Nudelman patent * * * was beyond the skill of a mechanic, and required the exercise of inventive genius" (F.F. 17, R. 117).

The factors entering into the standard of invention applicable to the facts in the case at bar appear from the decisions enumerated in Judge Lindley's opinion (R. 190). They may be briefly set forth as follows:

(a) Invention, rather than exercise of mechanical skill, is to be inferred where a device "satisfies an old and recognized want," *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, 474.

(b) The fact of accomplishment must be considered, that is, whether the accomplishment was unusual and has the tribute of public approval and imitation by the infringer, and "why [if the infringer had changed from a similar device to that of the patent] was not the change made earlier if the article possessed merit and its production was obvious to a mechanic skilled in the art," *Wahl Clipper Corp.* v. *Andis Clipper Co.* (7 Cir.), 66 F. 2d 162.

(c) The classic tests (1) of *Krementz* v. *Cottle Co.*, 148 U. S. 556, *e. g.*, "obvious advantages over previous structures of the kind," and (2) of the *Expanded Metal* case, 214 U. S. 366, 381, and *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 446, *viz.*, the fact that the improvement was not sooner adopted and used, the failure of skillful persons to see it, "to estimate its value and to bring it into notice," *Pyle Nat. Co.* v. *Lewin* (7 Cir.), 92 F. 2d 628, 630.

(d) A "completely new concept"—no suggestion of anything like the patented device in the prior art and the rule of *Potts* v. *Creager*, 155 U. S. 597, 608, that simplicity perceived after the event is not a criterion of invention, *Peckat Mfg. Co.* v. *Jacobs* (7 Cir.), 178 F. 2d 794.

It is quite clear that, on the facts found, Nudelman's device involved a revolutionary concept and a novel embodiment of that concept which performs a new function, achieves a beneficial result, and was beyond the skill of the mechanic. This is invention.

Although, as we have shown, the facts in the case at bar clearly distinguish the Nudelman patent from the patent involved in the *A & P* case, nevertheless we think that that case is widely misunderstood and misinterpreted, and that its meaning should be clarified. We do not believe that this Court intended in that case to set a standard of invention so high as to be unattainable save to a very few exceptional inventors, because this certainly was never the intent of the Constitution and the Congressional Enactment.

We do not believe that this Court desired in the *A & P* case to destroy the incentive that makes the ordinary run of inventors strive constantly to find new devices which, although not world-shaking, nevertheless improve the lot of mankind, nor to dry up the venture-capital that makes the fruits of such inventors' ingenuity available to the public. We do not believe that this Court desired to give a green light to all those would-be infringers who contribute nothing by their own brains to the progress of science and the useful arts, but who promptly and brazenly pirate the fruits of the struggling inventor's efforts with impunity and who thus lower respect for law, justice and common honesty by their successful escape from retribution.

This country has prospered due in no small measure to the patent system which has encouraged and stimulated individual and often impecunious inventors to strive to invent devices in the "useful arts" that would benefit themselves and therefore benefit society because they would make life a little better and a little easier on the hard level of ordinary, everyday living.

Under our present economy, the patent system is one of the chief safeguards by which the small individual inventor and the small businessman can combine to venture into the making of new products. Firmly entrenched businesses could possibly survive without a patent system, although it is very questionable whether they would be long willing to maintain huge research facilities and to venture forth on new products without adequate protection. But this much is certain,—the individual inventors who comprise the major part and backbone of this country's inventive genius, without patent protection, would have no alternative but to give up the struggle. Their unprotected product, the fruit of their ingenuity and inventive skill, could not be offered by them to prospec-

tive manufacturers for fear that it would be appropriated without compensation. Nor could small businessmen risk pioneering a new product if faced by the certainty that it would be immediately imitated and appropriated by those with more money than scruples. We do not believe that the elimination of the hitherto happy combination of the free-lance inventor and small businessman by restricting patent protection to major inventions only will promote the progress of science and the *useful arts*. A standard of invention should not be established which would cause the patent system to deteriorate to the point where it would benefit only the very rare and exceptional genius.

Nudelman made a noteworthy contribution to an everyday, ever-present, child-feeding problem. He solved this problem, which has existed from time immemorial, by a basically new concept. For the first time he provided a device which utilized the psychological process of mimicry in child feeding. He advanced and succeeded where others had failed. Nudelman's invention is a basic new approach to a problem which was never previously solved. We believe that his invention is of the kind that the patent laws were designed to protect.

II.

THE CUNO CASE (314 U. S. 84) DID NOT ESTABLISH A NEW, HIGHER, OR MORE EXACTING STANDARD OF INVENTION.

Petitioner charges (Pet. pp. 10-13; Pet. Br., p. 11) that the Court of Appeals of the Seventh Circuit has repeatedly rejected the "'flash of genius' test of invention as announced in the *Cuno* case." If it is meant that the classic test of the *Hotchkiss* case (*ante*, p. 24) has been rejected, then we most emphatically deny the charge. If it is meant that the court below has refused to share the belief of

some courts and writers that the *Cuno* case announced a new, higher, or more exacting standard of invention than that of the *Hotchkiss* case, then the charge is true, but it only means that the court below has correctly interpreted and followed this Court's decisions.

If the phrase "flash of creative genius" used in the *Cuno* decision is considered alone, it might, to some, indicate the establishment of a higher standard of invention than that previously existing, but this inference could be justified only by the novelty of the phrase, because substantially the same thought had been expressed in 1885 by Mr. Justice Matthews in *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, when he said that exercising "ordinary faculties" was in no sense "the creative work of that inventive faculty" required.

But when the phrase is read in its context, it must be observed that the initial words of the sentence are "That is to say," and preceding this in the same paragraph is a statement of the classic test of the *Hotchkiss* case, *i. e.*, "more ingenuity must be involved than the work of a mechanic skilled in the art," followed by citation of many cases and a restatement of two negative definitions of patentable invention. That all that was intended in the *Cuno* case was a restatement of the classic test of the *Hotchkiss* case appears as a matter of internal evidence from the respondent's brief in the *Cuno* case. It attacked the *Hotchkiss* decision as unsupported by the Patent Act, and asserted that "novelty" and "utility" were the only statutory prerequisites to patentability. Thus, that brief stated (p. 44):

> "While the word 'invention' connotes originality, it does not involve any idea that a little, or much, genius is required. * * * The degree of ingenuity, we submit, is not the test. Rather, the test is, Is the invention new?"

This Court, reaffirming the *Hotchkiss* case, restated its classic test, and, no doubt, in refutation of Automatic's contention, went on to say: "That is to say, the *new* device, however, *useful* it may be, must reveal the flash of creative genius, not merely the skill of the calling." The opinion concluded with the statement (p. 92):

> "Such considerations [public interest] prevent any relaxation of the rule of the *Hotchkiss* case as respondent would seem to desire."

In view of the slight improvement made by Mead (*ante*, pp. 32-33) and the decision against the patent in the Seventh Circuit (112 F. 2d 335), recourse to a "flash of creative genius" test was not at all necessary. And this Court did not rest its opinion upon any such test; rather, its initial ruling of invalidity, before detailed consideration, was (p. 88):

> "* * * the Mead device was not the result of invention but a 'mere exercise of the skill of the calling,' an advance 'plainly indicated by the prior art.'"

and finally it was said (p. 92) that Mead's adaptation was

> "no more than that expected of a mechanic skilled in the art."

The *Cuno* decision did not, and was not intended to, upset in the slightest the traditional line of demarcation between invention and mechanical skill, *viz.*, that the lowest order of invention is something more than mechanical skill and the highest degree of mechanical skill is something less than invention.

Whether or not a more exacting standard of invention had been or should be established, as suggested in *Picard* v. *United Aircraft Corp.* (2 Cir.), 128 F. 2d 632, was considered by the court below in *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.* (7 Cir.), 132 F. 2d 812. The opinion was rendered by the late Circuit Judge Evan

A. Evans, and was concurred in by Judges Otto Kerner and Walter C. Lindley—all able judges possessing exceptional experience in the field of patent jurisprudence. In sum, the court questioned the use of a "flash of genius test," as a new or higher one or as one which would gain anything by way of certainty or clarity. As a test, "flash of genius" should be rejected, said Judge Evans, because "it is incapable of acceptable definition." The court fully recognized that tests for inventive talent grow more exacting as better education, greater familiarity with machines, and wider experience raise "the aptitude of him whom we call the mechanic." And it expressly acknowledged that patentable novelty or invention required "something more than the skill of the mechanic,"—the classic test of the *Hotchkiss* case, reaffirmed in the *Cuno* case. The court said that it preferred to look to "the fact of accomplishment,—novelty appearing, rather than the method of accomplishment." Judge Evans then stated (p. 818):

> "The questions for the court are: What is the new product? What advance does it show over those in use or known to the art? *Our interest is in the child, not in how or where it was born or who were its parents.* Section 31, Title 35, U. S. C. A.
>
> "*Nowhere in the statute can be found any words which require, or permit us to inquire into the quality of mind or the activity of the mind of the inventor to determine the patentability of his products or processes.* Congress was interested in protecting the product of the mind,—not in whether it came as a flash to the mind or as a happy thought, or by long painstaking search and experimentation."

In finally considering the patented improvement and holding it "not invention," the court said that the conception was "obvious," that one feature was "not beyond the ken or practice of the ordinary mechanic," and that another did not "involve unusual skill,"—all perfectly good traditional tests.

Subsequently, in *Sinclair Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330, this Court in effect accepted Judge Evans' reasoning. Thus, referring to the difficulty experienced in applying the classic test of the *Hotchkiss* case, Mr. Justice Jackson held that its purpose was nevertheless clear, and continuing, he said (pp. 330-331):

> "* * * Under this test, some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee. *Whether or not those efforts are of a special kind does not concern us.* The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure. See *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 432-433. *Consequently it is not concerned with the quality of the inventor's mind, but with the quality of his product.*"

It is accordingly submitted that there is no basis whatever for the charge that the *Burnside* case announced, and subsequent cases* have applied, a test of invention which is not in harmony with the controlling decisions of this Court.

Circuit Judge Duffy, speaking for the Court of Appeals in the recent *Barie* case (182 F. 2d 724), summed up the court's attitude as to the "flash of creative genius" phrase as follows (p. 727):

> "* * * The Supreme Court has not repeated the much criticized phrase, or otherwise signified that it meant approving such a doctrine as a new test for patentability. The trial court in the case at bar did not particularly emphasize the phrase, except that

* *National Slug Rejectors, Inc.* v. *A. B. T. Mfg. Corp.*, 164 F. 2d 333, *cert. den.* 333 U. S. 832; *Falkenberg* v. *Bernard Edward Co.*, 175 F. 2d 427, *cert. den.* 338 U. S. 870; *Peckat Mfg. Co.* v. *Jacobs*, 178 F. 2d 794, *cert. den.* 339 U. S. 915; *Barie* v. *Superior Tanning Co.*, 182 F. 2d 724.

it was included in a quotation by the court. We shall, therefore, consider that the trial court applied *the correct traditional test*, that is: Did the claimed inventions in the patents in suit involve more than the skill or ingenuity that would be shown by a workman skilled in his line of work?"

Finally, we cannot emphasize too strongly that the court below is not guilty of the charge made on page 12 of the Petition for Certiorari that it is applying a test of invention which differs from that being applied in the Second Circuit,* with the result that manufacturers are hopelessly confused.

Petitioner's indictment of the Court of Appeals for the Seventh Circuit falls flat when we consider the record of the court in its dealings with patents since the *Cuno* case. An examination of the decisions reported since 123 F. 2d starting with November 10, 1941, when the *Cuno* case was decided, to and including the advance sheets for March 12, 1951 (186 F. 2d 744), shows the following:

Patent suits	92
Patents considered	149**
Patents held invalid	98
Patents held not infringed	22
Patents held valid	29

* At page 11 of the Brief for Petitioner, it is asserted that the court below stands alone in the rejection of the "flash of genius" test of invention as announced in the *Cuno* case. Of course, as we have shown, no new or more exacting test was established in that case. But petitioner's "knowledge" is startling. The notion that the *Cuno* case announced a higher standard than that previously existing has also been exploded in: *Brown & Sharpe Mfg. Co.* v. *Kar Engineering Co.* (1 Cir.), 154 F. 2d 48, Cert. Den. 328 U. S. 869; *Trabon Engineering Corp.* v. *Dirkes* (6th Cir.), 136 F. 2d 24; *In re Shortell* (CCPA), 142 F. 2d 292, 295. Confusion is further confounded by petitioner's suggestion at page 12 of the Petition for Certiorari that the *Trabon* and *Shortell* cases are in conflict with an alleged Seventh Circuit rule!

** In addition, the court considered 14 design patents and held each of them invalid.

Thus we see that the court below held only 29 patents valid and infringed out of a total of 149 patents. In other words, 80.54 per cent of the patents before it were held either invalid or not infringed.

Certainly such a high rate of patent mortality completely refutes petitioner's strictures on the court below.

We think it not without some significance, moreover, that the Mead patent invalidated in the *Cuno* case by this Court was previously invalidated by the court below, and that the Anthony and Jones patents upheld by this Court in the *Ray-O-Vac* and *Graver* cases (321 U. S. 275; 336 U. S. 271) had been previously upheld by the court below.

III.

UNDER THE PROVISIONS OF RULE 52(a) F. R. C. P. AND THE APPLICABLE DECISIONS OF THIS COURT, THE FINDINGS OF FACT OF THE COURTS BELOW MAY NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

Rule 52(a) F. R. C. P. provides in part:

> "In all actions tried upon the facts without a jury • • • the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; • • • *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* • • •"

In *Graver Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275, Mr. Justice Jackson, referring to the rule, said:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found

> the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Long prior to the adoption of the Rules of Civil Procedure, this Court had held that in patent cases it would not disturb concurrent findings where there was evidence to sustain them. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 416; *Adamson* v. *Gilliland*, 242 U. S. 350, 353. The only exception was in cases brought here because of a conflict of decision in different circuit courts of appeal; in that event, the rule was not strictly applied. *Thomson Spot Welder Company* v. *Ford Motor Co.*, 265 U. S. 445, 447.

Rule 52(a) did not expressly or even impliedly exclude patent cases, and since its adoption this Court has reaffirmed the prior well settled decisional rule. *Graver Mfg. Co.* v. *Linde Co., supra;* see also *Williams Co.* v. *Shoe Mach. Corp.*, 316 U. S. 364, 367; *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275; *Faulkner* v. *Gibbs*, 338 U. S. 267; *The Great A & P Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 153. The qualification previously obtaining in the case of conflicting decisions has also been reaffirmed. *Universal Oil Products Co.* v. *Globe Co.*, 322 U. S. 471, 473.

As pointed out by Mr. Justice Jackson in the *Graver* case, the ultimate question of patentability, *i. e.*, whether the statutory prerequisites of novelty, utility, and invention have been met, is one of law. But the existence or non-existence of each of the requisites is a question of fact. Thus, the question whether a patented device is anticipated or not is one of fact. *Bischoff* v. *Wethered*, 76 U. S. 812, 814-816; *Keyes* v. *Grant*, 118 U. S. 25, 35-36; *Haines* v. *McLaughlin*, 135 U. S. 584, 597-598; *Williams Co.* v. *Shoe*

Mach. Corp., 316 U. S. 364, 367. Likewise, the question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is a question of fact. *Thomson Spot Welder Co.* v. *Ford Motor Co.*, 265 U. S. 445. Indeed, it is not without significance that the instruction which divided the court in the *Hotchkiss* case, and which resulted in its classic test of invention, had put to the jury the fact determination of whether or not there was "no more ingenuity or skill required to construct the knob in this way than that possessed by an ordinary mechanic acquainted with the business" (11 How. 265).

The older cases in this Court referred to all show that "anticipation" and "inventiveness" were fact questions for the jury under suitable instructions upon the rules of law. Only if clearly against the weight of the evidence was the court authorized to set aside the verdict, but even then the question was still one of fact, not one of law for the court. *cf. Bischoff* case *supra*, p. 814.

In a patent case tried without a jury, the trial court is the trier of fact questions. The fact questions of anticipation and inventiveness require balancing of credibility, persuasiveness and weight of evidence.* A trial court's findings on these facts, "unless clearly errone-

* This is particularly true in the case at bar. Thus the Court of Appeals pointed out, after reference to this Court's decision in the *Graver* case (R. 191):

"* * * Here the court heard the testimony of a number of witnesses, including that of an expert. It expressly found the expert testimony, in certain respects, unworthy of credit. It saw demonstrations of the various devices in court. It passed upon the credibility of the witnesses. It acquired the knowledge that comes from practical demonstration of the two devices. Finally, it made its findings and conclusions of novelty, utility, patentable invention and infringement. To declare them clearly erroneous would be to overturn the trial court's decision upon controverted evidence and to usurp its function of passing upon the creditability of witnesses; this, under the authoritative decisions cited, we are not permitted to do."

ous," are therefore as conclusive upon review as is the verdict of a jury.

A finding of fact is not clearly erroneous unless it is (1) unsupported by substantial evidence, (2) contrary to the clear weight of the evidence, or (3) induced by an erroneous view of the law. As we have shown in the preceding sections of this brief, the concurrent findings of the courts below are not assailable upon any of these grounds.

The conclusiveness upon appeal of fact findings as to the statutory prerequisites to patentability made by a trier of facts was not involved in *Mahn* v. *Harwood*, 112 U. S. 354. The question which Mr. Justice Bradley was considering in that case was whether or not an accused infringer of a reissue patent could interpose a defense not specified by statute (§ 4920 Revised Statutes), such as improper enlargement of claims and unreasonable delay in applying for the reissue. The decree in the Circuit Court had been for the defendant, and upon appeal the plaintiff patent owner was contending that the defense upheld was not available to the defendant,—that the Federal courts were bound by the action of the Patent Office in reissuing the patent. Although holding that the decisions on questions of fact made by the Commissioner were conclusive except as to specific statutory defenses, Mr. Justice Bradley said (112 U. S. 358):

> "* * * But the statutory defenses are not the only defenses which may be made against a patent. Where it is evident that the Commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is no sound principle to prevent a party sued for its infringement from availing himself of the illegality, independently of any statutory permission so to do."

In that connection, and by way of an instance in which

patents issued contrary to law had been held to be void, Mr. Justice Bradley said:

> "In cases of patents for inventions, a valid defense not given by the statute often arises where the question is, whether the thing patented amounts to a patentable invention. This being a question of law, the courts are not bound by the decision of the commissioner, although he must necessarily pass upon it. See *Brown* v. *Piper*, 91 U. S. 37; *Glue Co.* v. *Upton*, 97 U. S. 3; *Dunbar* v. *Myers*, 94 U. S. 187, 197-199; *Atlantic Works* v. *Brady*, 107 U. S. 192, 199; *Slawson* v. *Grand St. Railroad Co.*, 107 U. S. 649, 652; *King* v. *Gallun*, 109 U. S. 99, 101."

It was concluded that where the Commissioner had exceeded his authority in granting or reissuing a patent, such fact "furnishes a good defence to a suit brought for its infringement" and the Circuit Court was affirmed.

Quite plainly, it was not intended in *Mahn* v. *Harwood*, by the observation that "patentable invention" is a question of law, to hold, and it does not remotely hold, that if the trier of facts, *upon credible and sufficient evidence*, finds the existence of the statutory prerequisites, and hence refuses a defense of want of patentable invention, those determinations and the refusal may be reviewed upon appeal as questions of law.

Accordingly, where, as here, the trier of facts found as facts that each statutory prerequisite has been met, the legal conclusion of patentability is inescapable. Unless the findings are clearly erroneous, they are conclusive upon appeal, and a reviewing court may not conclude as a matter of law that patentability is non-existent.

CONCLUSION.

The court below has not improperly applied the law to the facts of this case. The concurrent findings of validity are clearly correct and sound; they are adequately supported by substantial evidence. If the writ is not to be dismissed as improvidently granted (*Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319), the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondents.

APPENDIX.

PERTINENT STATUTE.

35 U. S. C. A. § 31; March 3, 1897, c. 391, § 1, 29 Stat. 692; May 23, 1930, c. 312, § 1, 46 Stat. 376, Aug. 5, 1939, c. 450, § 1, 53 Stat. 1212.

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

FILED
APR 6 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is petitioner's brief in reply to respondents' brief filed in this case.

I.

Respondents' argument as contained in their brief may be boiled down to this:

While the trial court in this case found and the Court of Appeals affirmed that the Smith prior art device (R. 170) was diametrically opposed in purpose and function to the Nudelman device the trial court was moved to make

such finding as was the Court of Appeals, because of the specific shape of the Nudelman device and not because of any difference in the elements of the combination of claims 2 and 3 and those of the Smith device.

Confirmation for this conclusion is found in the fact that the trial court made no finding that the elements of the combination defined by claims 2 and 3 were not old in the art. Furthermore the respondents frankly admit (P. 30, l. 13) that:

> *"It is essential to the purpose of the Nudelman structure that the device take the form of a living creature in order that the illusion of eating be created. Unless the structure takes on such a recognizable form, the whole objective fails and no useful purpose will be served."* See also p. 6, last line, resp. brief.

From such confession resolves the question: Did Nudelman in forming his device to simulate a living creature meet the statutory requirements for invention by promoting the arts and sciences and adding to the sum of useful knowledge?

This question must be answered in the negative because it was old in the art to form or shape a body to simulate a living creature (see Bowen, R. 136; Shea, R. 140; Livingston, R. 148; Trosper, R. 152; Theodoropulos, R. 158*).

Even if it were not old in the art to do so, to form a body to simulate a living creature constitutes merely a matter of

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NOTE: Emphasis briefwriter's unless otherwise indicated.

Respondents in making reference to the Manaster patent, the validity of which is not here in issue, would have done well to have written that Manaster, upon finding the Smith patent (R. 170) as a result of the stated search of the art, unlike Nudelman, made no claim to the Smith structure as his invention but confined his claims to a single feature of the oscillatory head of the dog to simulate eating upon engagement with the spoon when the latter is withdrawn from the mouth of the dog.

* Each of these patents shows it to be old to hinge the head of the figure to the body.

design and choice. Nudelman in forming the otherwise old Smith device to simulate a living creature, did nothing more than would be done by an artisan skilled in the art. If there were any invention in the shape of the Nudelman device, he should have taken out a design patent. He did not do so because, as frankly admitted by respondents (R. 66), if such a design patent had been taken out by respondents, such patent would have been invalid. In this connection, when before the trial court, respondents argued (R. 66):

> "Of course, if we had taken out a design patent on the *shape of the pig*, such a patent *would be invalid*, but where we have the shape of a pig or the *shape of an animal as being of the essence of this invention*, it is very essential, in order to carry out Nudelman's concept, that you have a figure simulating a living creature, a living animal, so that you may put food into its jaws, which has the psychology of mimicry, which this device has and which makes this device a very useful device, and that is why I objected to Mr. Snow striking from Claim 2 the simulation of an animal, simulating the figure of an animal because that is very essential to this invention and that is something which you find in the puppy device."

II.

In the second footnote appearing on page 14 of respondents' brief, it is stated by respondents that the Smith device is inoperative for at least one type of dry cereal, to-wit, corn flakes.

While corn flakes, either in a dry or wet state, is not generally classified as a baby food, whether corn flakes will be funnelled through the Smith hopper depends upon the form and the size of the passage. As confirmation of this, is the fact that the petitioner's accused device (Plf. Exh. 2) held to infringe claims 2 and 3, cannot, as demonstrated by

petitioner's witness Snow (R. 63)* function to funnel corn flakes back into the bowl after being emptied into the passage of such accused device.

Furthermore, the claims in issue do not specify the type of food which is to be emptied into the passage from the spoon. Such claims merely state that that which is to be emptied into the passage from the spoon is the "contents" of the spoon. All that is required of the patented device (and the same is true with respect to the prior art Smith device), is that the contents be of such character as will gravitate through the passage into the bowl, and such contents, as broadly stated in each of the claims in issue,** might be any of the well-known baby foods, such as Pablum, Farina, strained baby foods, milk, and the like.

If respondents meant to attack the operativeness of the Smith device, their claim of inoperativeness is untenable and without merit.

---

*"Q. I am handing you the defendant's device marked for identification as Plaintiffs' Exh. No. 2, and also corn flakes and some milk—and I have a blotter here which you might use, and do it very quickly and rapidly so as not to take up any unnecessary time.

A. For the purpose of the record I have placed some corn flakes, the same corn flakes that were used in connection with the demonstration this morning into the bowl of defendants' construction.

I have taken some corn flakes in a spoon with milk and placed it into the mouth of the defendant's puplike structure and I want to call the Court's attention to the fact that no corn flakes will pass through this passageway (indicating).

The fluid will, the fluid will fall right through but the corn flakes will not.

It is almost impossible, your Honor, to get the corn flakes on the line that passes through that passageway. They all jam right into the passageway and none pass through.

If you will close the head a minute and turn it over, your Honor, you can look into the interior of that passageway and see they will not pass through."

**Neither claim limits the use of the claimed device to any particular kind of food. Each claim describes that which is emptied from the spoon into the passage as "contents."

III.

Neither of the Claims in Issue Describes That the Contents of the Spoon Which Is Emptied Into the Passage Is Taken from the Bowl With Which the Device Is Associated. As to This There Is No Dispute.

The trial court in this case in finding that the Smith device was diametrically opposed in purpose and function to the Nudelman device, did not find and conclude, as respondents would make it appear, that the Smith device could not be used to interest a child to eat by taking a spoonful of the contents of the bowl and emptying it into the passage of the hopper for funnelling back into the bowl. While Smith in his specification does not so describe the use of his device, such use is obviously inherent to the structure thereof. This Court has consistently held in cases where a new purpose is claimed for an old machine or device, that:

> "It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he conceived the idea of the use or not." *Roberts* v. *Ryan*, 91 U. S. 150 at 157.

If a mother so desired in the feeding of a child, she could use the Smith device (Def. Exh. 3-3a) in the identical manner of the Nudelman device, *i. e.*, place the contents into the Smith bowl 6′ instead of into the hopper, and then take a spoonful of said contents from such bowl and empty it into the passage 10′ for funnelling back into the bowl 6′. Respondents do not argue to the contrary. Furthermore, the trial court made no finding of fact that food could not be placed in the bowl of the Smith device and taken therefrom by a spoon and emptied into the passage for return to the bowl.

It is erroneous and misleading for respondents to argue that the Nudelman device as claimed accomplishes the result of teaching a child to eat by the process of mimicry, for the reason that in order to carry out such teaching it is necessary that there be present, in addition to the claimed device, the unpatented bowl and the presence of the mother.

IV.

The Trial Court in This Case Made No Finding of Fact That the Claims in Issue Limit or Locate the Exit of the Passage* With Respect to the Bowl or Limit the Body Portion, Which is Placed Adjacent the Exterior of the Bowl, to a Main, Central and Principal Portion of the Figure; Nor Did the Trial Court Below Make Any Finding That the Claims in Issue Define the Passage of the Claimed Device to be Short and to Terminate Adjacent the Top Rim of the Bowl and be Located at Right Angles to the Base of the Bowl, as Respondents Would Make It Appear in Their Endeavor to Distinguish the Claims From the Smith Device (p. 18).**

No such finding could have been made by the trial court in this case because the claims are not so limited.

Any such attempt on the part of respondents to go beyond the claims in issue and draw upon the specification and drawings of the patent in suit to accord them novelty over the prior art, particularly the Smith device, is clearly contrary to well established principles of patent law. In this connection, this Court has consistently held that:

"Some persons seem to suppose that a claim in a

* With respect to the passage, the claims read (R. 133): "said forwardly extending portion having a simulated mouth and a passage, said passage having walls extending solely downward from said mouth through said forwardly extending portion."

** With respect to the body portion, the claims read (R. 133): "a body portion adapted to be placed adjacent the exterior of a feeding bowl."

> patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claims; *but not for the purpose of changing it, and making it different from what it is.*" *White* v. *Dunbar*, 119 U. S. 47 at 51.

The trial court in this case did not find and conclude that the claims in issue define a combination of new elements or a combination of old and new elements. There is no finding by the trial court that the prior art patents do not disclose the elements of the claimed combination. When the trial court in this case found that the Smith device was unlike the Nudelman device in structure, it clearly had in mind the shape of such Nudelman device. As confirmation of this statement is the indisputable fact that when the claims in issue are read upon the prior art, particularly the Smith patent, the device defined by each claim differs from the Smith patent only in shape.

V.

The Fact, if Such It be, That, as Claimed by Respondents, the Purpose and Function of a Device is New and Useful, Does Not Meet the "Flash of Genius" Test Formulated by This Court in Cuno Engineering Corporation v. Automatic Devices Corporation, 314 U. S. 84, at 91, Nor the Standard of Invention as Required by the Constitution.

In the *Cuno* case, this Court formulated the rule that to be patentable, the purpose and function of a device must not only be new and useful but the device must also meet the Constitutional requirement *of promoting the arts and sciences and adding to the sum of useful knowledge.*

As the object of the Nudelman device, to-wit, that of

interesting and stimulating a child to eat, is no different from that of the Smith device* and as both devices provide passages capable of the identical function of funnelling food into a bowl, Nudelman did nothing to promote the art and sciences, nor did he add to the sum of useful knowledge by forming his device to simulate a living creature.

VI.

A reading of Respondents' Brief Shows That the Facts of This Case Come Squarely Within the Decision of This Court in The Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corporation, 340 U. S. 147.

In that case this Court laid down the rule that a patent for a combination which only unites old elements with no change in their respective functions, does not meet the Constitutional requirement for invention.

In the case at bar, the claims in issue are combination claims—a fact not denied by respondents. All the elements set forth in each claim are old in the art. The shape of the Nudelman device in no way alters or modifies the functions of such elements. For example, the old function of the passage in delivering food to the unpatented bowl, as well as the old function of the old means (24 of Smith, Fig. 4, R. 170) for preventing lateral displacement of the passage from over the bowl, would in no way be changed by reason of the shape of the device. These elements perform their respective functions irrespective of the shape of the device. Respondents do not contend to the contrary.

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* In Smith's specification (R. 171, col. 1, ll. 39-48), he states: "It is also a purpose of my invention to provide a cereal dish of the above character, which due to the movement of the cereal into the liquid receiving portion, will interest a child eating cereal, in the operation of eating the same, to an extent that would not otherwise exist in children who do not particularly care to eat cereals of this character, thus aiding in feeding such children cereal by arousing their interest in the process of eating the same."

As in *The Great Atlantic & Pacific Tea Company* case, neither Court below in this case "has made any finding that the old elements which made up this [Nudelman] device perform any additional or different function in the combination than they performed out of it."

Contrary to respondents' argument, the decision of this Court in *The Great Atlantic & Pacific Tea Company* case is therefore especially applicable to the facts of this case. Under the doctrine there announced the patent in suit is invalid.

VII.

Petitioner Stated in Its Brief That to Petitioner's Knowledge the Court of Appeals for the Seventh Circuit in Several of Its Recent Decisions Rejected the "Flash of Genius" Test of Invention as announced in Cuno Engineering Corporation v. Automatic Devices Corporation, 314 U. S. 84, at 91. Respondents have not shown to the contrary.

Respondents offer the untenable argument that, contrary to petitioner's contention, the Court of Appeals for the Seventh Circuit, when it said that it "rejected the flash of genius test" formulated by this Court in the *Cuno* case, meant that the *Cuno* case did not formulate a higher standard of invention than existed previous to the decision in the *Cuno* case.

A review of the following cases decided by the Court of Appeals for the Seventh Circuit will show that respondents' argument in the above respect is without merit.

In *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.*, 132 F. 2d 812, the Court of Appeals (7th) said (p. 817):

> "The test of a 'flash of genius' *should be rejected* not only because it is incapable of acceptable definition but because it injects into the Statute something not appearing therein."

Falkenberg v. *Bernard Edwards Co.*, 175 F. 2d 427 (decided June 21, 1949), was an appeal from the trial court's finding that while the patented device was novel, presented genuine improvement, and had remarkable public acceptance, there was absent the flash of genius as described in the *Cuno* case. The Court of Appeals for the Seventh Circuit in holding that the trial court erred in applying the "flash of genius" test, said (p. 428):

> "As we have done heretofore (*Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co., supra*), *we reject the flash of genius test.*"

In *Barie* v. *Superior Tanning Co.*, 182 F. 2d 724 (decided June 16, 1950), the Court of Appeals for the Seventh Circuit said (p. 727):

> "Plaintiff stresses that in its opinion the trial court quoted from *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 62 S. Ct. 37, 86 L. Ed. 58, and included the portion containing the unfortunate 'flash of genius' phrase. This court *has twice specifically rejected* the flash of genius test."

It is petitioner's contention that had the Court of Appeals in this case scrutinized the claims in issue in the light of the standard of invention required by this Court as formulated in its several decisions, particularly the *Cuno* case and *The Great Atlantic & Pacific Tea Company* case, it would have held the patent in suit invalid as belonging to that class of patents not sanctioned by this Court.

VIII.

The Record in This Case Clearly Shows That the Commercial Success Alleged by Respondents in Their Brief, Was the Result of Respondents' Manufacture and Sale of a Child's Set Including, in Addition to the Simulated Pig of the Patented Structure, an Unpatented Bowl With Which the Pig is Associated, and a Set Including an Ensemble of the Simulated Pig of the Patent, an Unpatented Bowl, an Unpatented Spoon and Fork, and an Unpatented Rack for the Spoon and Fork.

In respondents' advertisement (Plf. Exh. 5, R. 67) it is emphasized that "He [Hungry Piggy] is accompanied by a companion 'Piggy Bowl' comprising a two piece set with the further addition of a novel spoon, fork and stand in a five piece ensemble." See to the same effect the respondents' advertisement, Plf. Exh. 7, 9 and 11 (R. 69, 70 and 74), in which it is additionally emphasized that "The bottom of the accompanying bowl contains an engraving of a well fed little piggy and the words 'All Gone'." The evidence also shows (R. 72, Plf. Exh. 9) that to induce the sale of plaintiffs' commercial ensemble, there were offered therewith "6 cans of your favorite brand of baby food."

Upon the record in this case it is clear that separate and apart from the other unpatented items of the ensemble, the patented device has no commercial value. It is admitted by respondents (R. 19-20) that while the patented device was offered for sale separate and apart from the unpatented bowl, *it was never sold separately therefrom.*

In any event, in *The Great Atlantic & Pacific Tea Company* case, this Court succinctly stated that commercial success without invention will not make out patentability.

IX.

The standard of patentability is a Constitutional standard and the question of validity of a patent is a question of law. *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147.

Respondents urge (p. 46) upon this Court the provisions of Rule 52(a) of the Federal Rules of Civil Procedure.

Petitioner submits that a complete reply to that section of respondents' brief is found in the decision of this Court in *The Great Atlantic & Pacific Tea Company* case, wherein this Court said:

> "It is urged, however, that concurrence of two courts below, in holding the patent claims valid, concludes this Court. A recent restatement of the 'two court rule' reads, 'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing or error.' *Graver Tank Co.* v. *Linde Co.*, 336 U. S. 271, 275. The questions of general importance considered here are not contingent upon resolving conflicting testimony, for the facts are little in dispute. We set aside no finding of fact as to invention, for none has been made except as to the extension of the counter, which cannot stand as a matter of law. The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components. It is on this ground that the judgment below is reversed."

In the concurring opinion in *The Great Atlantic & Pacific Tea Company* case, it was said:

> "The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law. *Mahn* v. *Harwood*, 112 U. S. 354, 358.

> The Court fashioned in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275, a rule for patent cases to the effect that this Court will not disturb a finding of invention made by two lower courts, in absence of a very obvious and exceptional showing of error. *That rule*, imported from other fields, *never had a place in patent law.* Having served its purpose in *Graver Mfg. Co.* v. *Linde Co., it is now in substance rejected.* The Court now recognizes what has long been apparent in our cases: that it is the 'standard of invention' that controls. That is present in every case where the validity of a patent is in issue. It is that question which the Court must decide. *No 'finding of fact' can be a substitute for it in any case.* The question of invention goes back to the Constitutional standard in every case. We speak with final authority on that Constitutional issue as we do on many others."

The defect in the judgment in this case, like that in *The Great Atlantic & Pacific Tea Company* case, "is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components." On this grounds the judgment below should be reversed as to the validity of the patent in suit.

Conclusion.

To sustain the validity of a patent of the character of that here in suit is to obstruct rather than to stimulate invention, for it tends to create, as said by this Court in *Atlantic Works* v. *Brady*, 107 U. S. 192 at 200, "a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the art."

The judgment of the Court of Appeals in this case should be reversed as to the validity of the patent in suit.

Respectfully submitted,

CREST SPECIALTY (NOT INC.),
Petitioner,
By CLARENCE E. THREEDY,
Its Attorney.

Chicago, Illinois,

April 5, 1951.

FILED
MAY 7 1951
CHARLES ELMORE CROPL
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

SIDNEY NEUMAN,
MAX R. KRAUS,
Attorneys for Respondents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446.

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondents pray that this Court grant rehearing of its judgment of April 23, 1951, reversing the judgment of the United States Court of Appeals for the Seventh Circuit, and in support hereof show:

The majority opinion by Mr. Justice Jackson in the *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, did not change the existing law. Neither did

it establish a new standard of patentability requiring summary reversal of the judgment below. That opinion was no more than a reaffirmation of the rule of *Hailes* v. *Van Wormer*, 20 Wall. 353, 368, *Palmer* v. *Corning*, 156 U. S. 342, and *Grinnell Washing Mach. Co.* v. *Johnson Co.*, 247 U. S. 426, 432-4.

The Nudelman patent in the case at bar, unlike the Turnbull patent in the *A. & P.* case, is not for a combination wherein old elements have been brought into juxtaposition and there allowed each to work out its own effect—each performing its old and usual function. The Nudelman patent discloses a brand-new device embodying a brand-new concept. It was expressly held by the trial court (R. 118) that the Nudelman patent involved "a new principle and function, and achieves a beneficial result."

1. **The Court has wholly failed to give effect to the provisions of Rule 52(a) F. R. C. P. and to applicable decisions of this Court holding that findings of fact may not be set aside unless clearly erroneous.** Under the "two court" rule, the judgment of the Court of Appeals for the Seventh Circuit should have been affirmed.

This Court has repeatedly held that it will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Falkner* v. *Gibbs*, 338 U. S. 267; *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275; *Williams Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 416.

Although Mr. Justice Douglas in the concurring opinion in the *A. & P.* case has asserted the contrary,* it is our understanding of the majority opinion in that case that the

* "That rule, imported from other fields, never had a place in patent law. Having served its purpose in *Graver Mfg. Co.* v. *Linde Co.*, it is now in substance rejected."

"two court" rule has not been rejected. *Mr. Justice Jackson expressly stated that no finding of fact as to invention was being set aside and that the defect found in the judgment was that a "standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components."*

Notwithstanding the assertions to the contrary of Mr. Justice Douglas in the concurring opinion in the *A. & P.* case, the questions of novelty and invention in patent cases are questions of fact and have always been so considered by this Court. *Bischoff* v. *Wethered*, 9 Wall. 812, 814-816; *Keyes* v. *Grant*, 118 U. S. 25, 35-36; *Haines* v. *McLaughlin*, 135 U. S. 584, 597-598; *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 416; *Thomson Spot Welder Co.* v. *Ford Motor Co.*, 265 U. S. 445, 447; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367; *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275; *Falkner* v. *Gibbs*, 338 U. S. 267. On the other hand, *Mahn* v. *Harwood*, 112 U. S. 354, cited and relied upon by Mr. Justice Douglas for his thesis, had nothing whatever to do with the nature of specific findings relating to the statutory prerequisites to patentability (Respondents' Brief, pp. 49-50; cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 399, 400).

The questions of validity in the case at bar were contingent upon resolving conflicting testimony (R. 191, Respondents' Brief, p. 48). Full and detailed findings of fact were made by the trial court upholding novelty, utility, and invention (F. F. 4-10, inc., 15, 16, 17, R. 111-113, 115-117). *Unlike the A. & P. case, explicit findings were made by the trial court to the effect that additional and different functions were produced by Nudelman's device* (F. F. 5, 6, R. 112). There is also an explicit finding that the "conception and production of a device like that * * * in the Nudelman patent * * * was beyond the skill of a mechanic,

and required the exercise of inventive genius" (F. F. 17, R. 117). These findings are overwhelmingly supported by the evidence, and there is no legal defect in the judgment. The factors entering into the standard of invention employed by the court below are those time-honored ones found, *inter alia*, in *Paramount Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 464, 474 (Respondents' Brief, pp. 37-38), and which were not rejected or overruled in the *A. & P.* case.

2. **The Court has failed to consider and decide the only issues squarely raised by the petition for certiorari, namely, whether Cuno Corp. v. Automatic Corp., 314 U. S. 84, established a higher or more exacting standard of invention, and whether the Court of Appeals for the Seventh Circuit had rejected the alleged "flash of creative genius test" of that case as charged.**

Counsel have always understood that cases are brought here on certiorari not because some of the justices have a *prima facie* impression that a decision below is erroneous or to provide an additional appellate review of a case, but rather to resolve questions having "importance far beyond the particular facts and parties involved."* The *per curiam* reversal in the case at bar wholly fails to resolve any issues raised by the petition.

If this Court had undertaken to settle the alleged matter of importance presented for decision by the petition for certiorari, it could have reached no other result than agreement with the court below, because—

(a) The *Cuno* case was no more than a reaffirmation of the classic test of *Hotchkiss* v. *Greenwood*, 11 How. 248, *i. e.*, that invention requires that "more ingenuity must be involved than the work of a mechanic skilled in the art" (Respondents' Brief, pp. 40-46);

* See, for example, the address of Mr. Chief Justice Vinson before the American Bar Association, September 7, 1949, quoted in part at page 98 of *Supreme Court Practice*, Stern & Gressman.

(b) The Court of Appeals for the Seventh Circuit quite properly refused to be stampeded into agreeing that a new "flash of genius test" was applicable in patent cases, and correctly held in the *Burnside* case (132 F. 2d 812) that nowhere in the patent statute "can be found any words which require or permit us to inquire into the quality of the mind or the activity of the mind of the inventor to determine the patentability of his products or processes" (Respondents' Brief, pp. 42-43); and

(c) This Court in effect accepted the reasoning of the *Burnside* case in *Sinclair Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330, when Mr. Justice Jackson held that the test of invention, under the patent system, "is not concerned with the quality of the inventor's mind, but with the quality of his product" (Respondents' Brief, p. 44).

Furthermore, this Court should clarify the confused situation* now existing by virtue of Mr. Justice Douglas's

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* See comment in *Journal of the Patent Office Society* (Feb., 1951), Vol. 33, pp. 83, 87, 102, 148. Moreover, see *Journal of the Patent Office Society*, Vol. 33, p. 236, reporting the appearance on December 14, 1950, of the following in the German magazine *Aussenhandelsdienst* (Foreign Trade Service):

A Decision of the United States Supreme Court of Importance to German Exporters.

"In the future German exporters will run much less danger than before that their newly made improved articles will infringe American patents, as a result of a newly rendered decision of the United States Supreme Court. A decision of this Court rendered in appeal proceedings held that so-called gadgets, namely, technical improvements for domestic use and similar articles, are no longer patentable, contrary to the previous practice of the United States Patent Office. The Court referred to the American Constitution and declared that only such things are worthy of being patentable which 'promote the progress of science.'

"For the American business man this means that in the future, after having successfully attacked a patent, he will be able to import into the United States, many articles which heretofore could not have been imported for fear of patent infringement. American importers will be interested, in view of this new decision, in many articles which heretofore they rejected for fear of patent involvement."

concurring opinion in the *A. & P.* case, wherein he contributed as the test of invention, requirements that the patent "serve the ends of science," "push back the frontiers of chemistry, physics, and the like," "make a distinctive contribution to scientific knowledge," and "be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." That view ignores the fact that Article I, Sec. 8, of the Constitution expressly authorizes patents for improvements in the "useful arts" as well as "science."* Useful arts are coordinate and hence of equal importance with science. Moreover, the quotation made by Mr. Justice Douglas from *Atlantic Works* v. *Brady*, 107 U. S. 192, 200, does not support his test. When Mr. Justice Bradley's opinion is read in context, it appears that he was not excluding improvements in the "useful arts." Thus he said (107 U. S. 200), just preceding the matter quoted by Mr. Justice Douglas:

> "The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and *makes a step in advance in the useful arts.* Such inventors are worthy of all favor."

The Nudelman patented device, albeit a very simple one, did make a step in advance in the useful arts. Has it been held invalid merely because it is simple and not of a scientific character? If so, this is the result of a mistaken theory of the constitutional purpose of patents, and Mr. Justice Douglas's concurring opinion in the *A. & P.* case holding that "gadgets" (presumably simple or non-scientific devices) are not patentable should be disapproved. It constitutes an expression which is diametrically opposed to the

* "Science" was not even mentioned in the first patent law, *i. e.*, the Act of 1790, 1 Stat. 109. It was entitled "An act to promote the progress of useful arts." This is true also of most of the subsequent enactments, including the first comprehensive patent act of 1836, 5 Stat. 117.

classic test of invention of the *Hotchkiss* case, which was reaffirmed by this Court in the *Cuno* case. In effect, it limits the application of the constitutional provision regarding inventions and the statutes which have been in force for over 150 years.

We respectfully submit that the courts are powerless to invalidate patents upon "gadgets" on any *de minimis* basis. If an improvement advances the useful arts, *i. e.*, provides a benefit to society on the *level of living*, and the other prerequisites to patentability, namely, novelty and invention are present, the patent therefor is valid and should be enforced, for otherwise the "public faith" which has been pledged to the inventor (*Grant* v. *Raymond*, 6 Pet. 218, 242), is being violated. An inventor who, following the patent statutes, has disclosed his invention to the public is entitled to "insist upon all the advantages and benefits which the statute promises to him" (*Paper Bag Patent* case, 210 U. S. 405, 424).

In the report of the National Patent Planning Commission appointed by President Roosevelt (Executive Order No. 8977, Dec. 12, 1941) to conduct a comprehensive survey and study of the American patent system, it was said, *inter alia* (H. R. Doc. No. 239, 78th Cong., 1st Sess. 1):

> "The strongest industrial nations have the most effective patent systems and after careful study, the Commission has reached the conclusion that *the American system is the best in the world.*"

Simple mechanical devices have helped to make America the great industrial nation which it is, and simplicity has always been one of the primary virtues which in mechanical devices made them economically useful and of outstanding merit and therefore deserving of patent protection. *Loom Co.* v. *Higgins*, 105 U. S. 580, 591; *Potts* v. *Creager*, 155 U. S. 597, 608; *Expanded Metal Co.* v. *Bradford*, 214 U. S.

366, 381; *Diamond Rubber Co.* v. *Consolidated Rubber Co.*, 220 U. S. 428, 435.

If simple improvements are beyond the scope of our patent system, then the foregoing and such cases as *The Barbed Wire Patent Case*, 143 U. S. 275; *Krementz* v. *The S. Cottle Company*, 148 U. S. 556—a collar button; and *Sharp* v. *Stamping Co.*, 103 U. S. 250—a steak broiler; not to mention a legion of others, were incorrectly decided. And if the patent laws now need revamping or change to exclude patents upon simple but nevertheless inventive improvements—if patents for simple devices in the "useful arts" are to be barred as a matter of law notwithstanding the presence, under traditional tests, of invention—is that not the business of Congress and not of the courts?

Conclusion.

Four judges below (Kerner, Duffy, Lindley, and Igoe) concurred in correctly finding the facts. They did not apply improper rules of law to those facts, and their ruling of validity is not flagrantly and palpably erroneous, requiring summary reversal—not even in the light of the *A. & P.* case decided after the judgment below. Under the "two court" rule, the judgment below should have been affirmed.

A rehearing in this case should be granted.

Respectfully submitted,

SIDNEY NEUMAN,
MAX R. KRAUS,
Attorneys for Respondents.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

SIDNEY NEUMAN.

FILED
MAY 10 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.), A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER, AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENTS' PETITION FOR REHEARING.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

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PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENTS' PETITION FOR REHEARING.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents' petition for rehearing should be denied. Such petition in its entirety is a mere restatement of respondents' position as heretofore presented in their brief filed in this Court and at the oral argument before this Court. Such petition for rehearing contains nothing not heretofore considered by this Court.

As heretofore pointed out by petitioner in its brief and at the oral argument before this Court, neither the Court

of Appeals nor the trial court in this case had the benefit of the decision of this Court in *The Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corporation*, 340 U. S. 147, when rendering their respective judgments. Had they had the benefit of such decision, they would have decided as this Court did.

The respondents' petition for rehearing should be denied.

Respectfully submitted,

CLARENCE E. THREEDY,
Attorney for Petitioner.

Chicago, Illinois,
May 8, 1951.

APRIL 23, 1951.

Per Curiam Decisions.

No. 446. CREST SPECIALTY, A LIMITED PARTNERSHIP, *v.* TRAGER, DOING BUSINESS AS TOPIC TOYS, ET AL. Certiorari, 340 U. S. 928, to the United States Court of Appeals for the Seventh Circuit. Argued April 10, 1951. Decided

April 23, 1951. *Per Curiam:* The judgment is reversed. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147. *Clarence E. Threedy* argued the cause and filed a brief for petitioner. *Max R. Kraus* argued the cause for respondents. With him on the brief was *Sidney Neuman*. Reported below: 184 F. 2d 577.